In the Supreme Court of the United States

OCTOBER TERM, 1922.

FRANK TERRACE and ELIZABETH TERRACE, his wife, and N. NAKATSUKA,
Appellants,

vs.

LINDSAY L. THOMPSON, as Attorney General of the State of Washington,
Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

Appellants' Brief

JAMES B. HOWE,
E. H. GUIE,
DALLAS V. HALVERSTADT,
Solicitors for Appellants.

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Appellants' Brief

STATEMENT OF THE CASE.

This is an appeal from a decree of the United States District Court for the Western District of Washington, Southern Division, granting appellants' motion to dismiss, and dismissing, the amended bill of complaint, in an action to restrain

the enforcement of the Alien Land Act. The action involves the constitutionality of that Act.

THE STATUTE AND CONSTITUTIONAL PROVISION.

"AN ACT relating to the rights and disabilities of aliens with respect to lands, providing for forfeitures in certain cases, prescribing penalties, and repealing sections 135 and 136 Pierce's Code, 8775 and 8776 of Remington and Ballinger's Annotated Codes and Statutes of Washington.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

"*Section 1.* In this act, unless the context otherwise requires,

"(a) 'Alien' does not include an alien who had in good faith declared his intention to become a citizen of the United States, but does include all other aliens and all corporations and other organized groups of persons a majority of whose capital stock is owned or controlled by aliens or a majority of whose members are aliens;

"(b) 'Land' does not include lands containing valuable deposits of minerals, metals, iron, coal or fire clay or the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom, but does include every other kind of land and every interest therein and right to the control, possession, use, enjoyment, rents, issues or profits thereof except a mortgage and except a right to the possession, use or enjoyment of land for a period of not more than ten years for a purpose for which an alien is ac-

corded the use of land by a treaty between the United States and the country whereof he is a citizen;

"(c) 'Land' also includes any share or interest in a corporation or other organized group of persons deemed an alien in this act which has title to land either heretofore or hereafter acquired;

"(d) To 'own' means to have the legal or equitable title to or the right to any benefit of;

"(e) 'Title' includes every kind of legal or equitable title;

"(f) Ownership of or title to land acquired by inheritance or in good faith either under mortgage or in the ordinary course of justice in the collection of debts, or acquired by a female citizen afterwards expatriated by marriage to an alien, is excluded;

"(g) 'Inheritance' includes devise;

"(h) 'Mortgage' includes every kind of lien on land;

"(i) A mortgage of land under which an alien is entitled before default to any control, possession, use or enjoyment of the land, is an absolute conveyance; and

"(j) 'Person' includes an individual, partnership, corporation, or any other organized group of persons.

"*Section 2.* An alien shall not own land or take or hold title thereto. No person shall take or hold land or title to land for an alien. Land now held by or for aliens in violation of the constitution of the state is forfeited to and declared to be the property of the state. Land hereafter conveyed to or for the use of aliens in violation

of the constitution or of this act shall thereby be forfeited to and become the property of the state.

"*Section 3.* An alien is not qualified to be trustee under a will, executor, administrator or guardian, if any part of the estate is land. *Provided,* an alien now lawfully acting in any such capacity may continue for not more than two years.

"*Section 4.* If hereafter an alien acquires land by inheritance or in good faith either under mortgage or in the ordinary course of justice in the collection of debts and, remaining an alien, held the same for more than twelve years from the date title was so acquired or control or possession taken, the land shall be forfeited to the state.

"*Section 5.* If an alien, claiming or holding under a mortgage, has control, possession, use or enjoyment of the mortgaged land, the obligation secured by the mortgage shall be deemed matured and the mortgage shall be foreclosed; and if the land be not sold under foreclosure within three years after the alien has obtained control, possession, use or enjoyment, the mortgage and the obligation thereby secured shall be forfeited to the state and shall be foreclosed for the use of the state.

"*Section 6.* Unless an alien who has declared his intention to become a citizen of the United States be admitted to citizenship within seven years after his declaration was made, it shall be presumed that he declared his intention in bad faith.

"*Section 7.* Whoever

"(a) Knowingly transfers or conveys land

or title to land to an alien; or

"(b) Knowingly takes land or title to land in trust for an alien; or

"(c) Holding in trust for an alien land or title to land, either heretofore or hereafter acquired, fails for thirty days after acquiring knowledge or notice that he holds in trust for an alien to disclose the fact to the attorney general or the prosecuting attorney of the county where the land is situated; or

"(d) Being an alien and having title to land or control, possession, use or enjoyment of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney general or the prosecuting attorney of the county where the land is situated the nature and extent of his interest in and title to the land; or

"(e) Being an officer or agent of a corporation or other organized group of persons which has title to land or control, possession, use or enjoyment of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney general or the prosecuting attorney of the county where the land is situated the nature and extent of the interest of persons not citizens of the United States in the corporation or other organized group of persons; or

"(f) Being an officer or agent of a corporation or other organized group of persons which holds in trust for an alien title to land or control or possession of land, whether heretofore or hereafter acquired, refuses to disclose to the attorney general or the prosecuting attorney of the county where the land is situated the nature and extent of the alien's interest in and title to the land; or

"(g) Wilfully counsels, aids or abets another in violating or evading this act,

"Is guilty of a gross misdemeanor.

"*Section 8.* It shall be the duty of the attorney general and of the prosecuting attorneys of the several counties to enforce this act, and of the attorney general to direct and control its enforcement.

"*Section 9.* Property forfeited to the state by this act shall inure to the permanent common school fund and be managed and disposed of accordingly.

"*Section 10.* This act shall not impair any title or right heretofore or hereafter acquired from or derived through an alien in good faith and for value by a person not under an alien's disability.

"*Section 11.* If any section or provision of this act shall be adjudged to be invalid or unconstitutional such adjudication shall not affect the validity of the act as a whole or any section, provision, or part thereof not adjudged invalid or unconstitutional.

"*Section 12.* Sections 135 and 136 Pierce's Code, 8775 and 8776 of Remington and Ballinger's Annotated Codes and Statutes of Washington are hereby repealed.

"Passed the House February 25, 1921.

"Passed the Senate March 2, 1921.

"Approved by the Governor March 8, 1921."

(Chapter 50, Laws of Washington, 1920-1921.)

Sections 8775 and 8776 of Remington & Ballinger's Annotated Codes and Statutes of Washington, mentioned in Section 12 of the Act, are as follows:

> "*Section 8775.* Any alien, except such as by the laws of the United States are incapable of becoming citizens of the United States, may acquire and hold lands, or any right thereto or interest therein, by purchase, devise, or descent, and he may convey, mortgage, and devise the same, and if he shall die intestate, the same shall descend to his heirs; and in all cases such lands shall be held conveyed, mortgaged, or devised, or shall descend, in like manner and with like effect as if such alien were a citizen of this state or of the United States."
>
> "*Section 8776.* Any alien, except such as by the laws of the United States are incapable of becoming citizens of the United States, whether a resident of this state or not, shall be and is hereby permitted to construct, build, equip, lease, use, sell, hold, and dispose of, or acquire by purchase or otherwise, any railroad, tramway, or bridge in this state, and shall be and is hereby allowed to work and operate the same, to acquire and hold lands in connection therewith, to mortgage the same, or said railroad, tramway or bridge, and to transact the business, collect and receive tolls, hold, use and dispose of the franchise and rights of any such railroad, tramway, or bridge, with the same powers and privileges in all respects as now or may hereafter belong to citizens of this state."

Section 33 of Article II of the Constitution of the State of Washington is as follows:

"*Section 33.* The ownership of lands by aliens, other than those who in good faith have declared their intention to become citizens of the United States, is prohibited in this state, except where acquired by inheritance, under mortgage or in good faith in the ordinary course of justice in the collection of debts; and all conveyances of lands hereafter made to any alien directly or in trust for such alien shall be void; Provided, that the provisions of this section shall not apply to lands containing valuable deposits of minerals, metals, iron, coal, or fire clay, and the necessary land for mills and machinery to be used in the development thereof and the manufacture of the products therefrom. Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purpose of this prohibition."

THE FACTS.

The plaintiffs, suing on behalf of themselves and all others similarly situated, filed their bill of complaint in which they alleged:

That the plaintiffs Terrace are citizens of the United States and of the State of Washington and residents of the Western District of Washington, and plaintiff Nakatsuka is a subject of the Emperor or Japan (and in the amended bill of complaint it is further alleged that he was born in the Empire of Japan, of Japanese parents), and a resident of the Western District of Washington, bring their

bill of complaint against the defendant, as Attorney General of the State of Washington, a citizen of the United States and of the State of Washington, and a resident of the Southern Division of the Western District of Washington; that the value of the matter in dispute in the action between the plaintiffs and the defendant exceeds the sum of $3,000.00, exclusive of interest and costs; that the jurisdiction of the court is invoked because of the Federal question involved in the action and equity jurisdiction and because plaintiffs have no adequate remedy at law; that the plaintiffs Terrace are, and for a number of years have been, the owners of a designated tract of real estate in King County, State of Washington, which is particularly adapted to raising vegetables, and for a number of years last past has been and now is being devoted to that and to agricultural purposes; that the plaintiff Nakatsuka is a capable farmer and is in all respects a desirable person to become a tenant of said real estate; that the plaintiffs Terrace desire to lease said real estate to Nakatsuka for period of five years, and Nakatsuka desires to accept such lease, and, but for the Act, the plaintiffs would execute a lease of said real estate from the plaintiffs Terrace to the plaintiff Nakatsuka for a period of five years from the date of the bill of complaint; that Nakatsuka, in addi-

tion to being a capable farmer, is engaged in the business of trading, wholesale and retail, in farm products (in the amended complaint is added "and shipping the same in intrastate, interstate and foreign commerce"), and, instead of purchasing said farm products, he had produced and desires to continue to produce his own farm products for the purpose of selling them in the wholesale and retail trade, and if he is prevented from leasing land for the purpose of producing such farm products for such trade he will be prevented from engaging in trade and the incidents to trade as he is authorized to do under the existing treaty between the United States of America and the Empire of Japan; that the defendant, as Attorney General, has threatened to enforce, and will enforce, each and all of the terms of the Act and in the event plaintiffs enter into a lease of said real estate for the purpose and term aforesaid, will forfeit or attempt to forfeit such leasehold interest to the State of Washington, and will prosecute the plaintiffs criminally for an alleged violation of the Act; that the Act is in its terms so drastic, and the penalties for a violation of its terms are so great, that neither of the plaintiffs may make or execute such lease, even for the purpose of testing the constitutionality and validity of said Act, and unless the court shall determine its validity in

this proceeding, the plaintiffs will be compelled to submit to the Act whether the same be valid or invalid. The plaintiffs charge that said Act is in contravention of Section 33 of Article II of the Constitution of the State of Washington, and especially invoke the protection thereof; that said Act is in violation of and contrary to the existing Treaty between the United States of America and the Empire of Japan, and particularly Article I thereof, in that it prohibits subjects of the Emperor of Japan from leasing land for residential and commercial purposes, and from doing everything incident thereto or necessary for trade upon the same terms as native citizens of the United States, and especially invoke the protection of said Treaty and Article I thereof; that said Act is in contravention of Section 3 of Article I of the Constitution of the State of Washington in that it deprives the plaintiffs of property without due process of law, and of Section 12 of Article I of the Constitution of the State of Washington in that it grants privileges or immunities which upon the same terms do not equally belong to all citizens, and especially invoke the protection of the said provisions; that said Act is in contravention of Section 1 of the Fourteenth Amendment to the Constitution of the Unied States in that it deprives the plaintiffs of property without

due process of law and denies to them and each of them the equal protection of the law, and especially invoke the protection of said Amendment.

They further allege that if they are not permitted to enter into such lease of said real estate, a large and irreparable loss will occur to them and each of them, and that they have no adequate remedy at law but are relievable only in a court of equity (R. 1-5).

At the time of filing the bill, the plaintiffs served and filed a motion for a temporary injunction, restraining the defendant, *pendente lite,* from enforcing or attempting to enforce the Act. At the time that motion came on for hearing, the defendant filed its motion to dismiss (which was later amended by consent) upon the ground of lack of equity, insufficient facts and that the plaintiffs and each of them have a plain, adequate, complete and speedy remedy at law (R. 10, 11). The court denied the motion for a temporary injunction, holding the Act valid (R. 30). The opinion appears on pages 12-24 of the record.

Thereafter, on leave, an amended bill of complaint was filed, containing the two amendments heretofore mentioned. The defendant filed a motion

to dismiss, on the same grounds as theretofore, and the court sustained the motion to dismiss and dismissed the action (R. 31).

SPECIFICATIONS OF ERROR.

The assignments of error appear on page 33 of the record. They allege that the court erred in holding the Act constitutional and not in violation of the equal protection clauses of the Fourteenth Amendment and of the Constitution of the State of Washington, and of the Alien Land provisions of the Constitution of the State of Washington and the Treaty between the United States and the Empire of Japan.

The question for decision is whether the amended bill of complaint states a cause of action.

THE JURISDICTION.

By the terms of the act, "land" includes "the right to the control, possession, use, enjoyment, rent, issues or profits thereof except a mortgage," etc. (Section 1 [b]). "Title" includes every kind of legal or equitable title (Section 1 [e]). An alien may not own land or take or hold title thereto. Land conveyed to or for the use of aliens shall be for-

feited to the state (Section 2). Whoever knowingly transfer or conveys land or title to land to an alien, and an alien who having title to land or control, use or enjoyment of land, whenever acquired, refuses to disclose the fact to the Attorney General, is guilty of a gross misdemeanor (Section 7), which is punishable by imprisonment in the county jail for not more than one year, or by fine of not more than one thousand dollars, or both (Remington & Ballinger's Ann. Codes & Stat., Sec. 2267).

Obviously "land," as defined, includes a lease of land. Upon the execution and delivery of the lease, the leasehold interest would, by the terms of the act, *ipso facto* be forfeited to the state, and Nakatsuka would still be liable for the payment of the rent reserved, although possession and use of the land be ended. The state could make any disposition whatever of the leasehold interest, irrespective of appellants' wishes, without rent during the term, unless the Terraces might be able to collect the same from Nakatsuka; and, in addition, the Terraces would be liable under the criminal penalties prescribed by the act. And of course, if Nakatsuka did not report the making of the lease to the Attorney General, he would be similarly criminally liable.

Obviously no land owner can do other than sub-

mit to the act, if equity jurisdiction does not exist. Similarly, no tenant can run the risk imposed by the act. Nor can he test the validity of the act, whatever be his willingness, unless and until he can find a landowner who is willing to incur the forfeiture and suffer the criminal punishment. In addition thereto, the Fourteenth Amendment is invoked, and the act prohibits the Terraces from making use of their land as they otherwise might and prevents Nakatsuka from even using the land.

These facts establish the jurisdiction within the following cases:

Ex Parte Young, 209 U. S. 123.
Raich vs. Truax, 219 Fed. 273.
Truax vs. Raich, 239 U. S. 33.
Buchannan vs. Warley, 245 U. S. 60.

PROPOSITIONS DISCUSSED.

The propositions we desire to discuss are as follows:

1. The state constitutional provision is exclusive of all disabilities of aliens respecting lands and the legislature had no power to add thereto.

2. The act takes the property of the parties without due process of law, in that it prohibits Na-

katsuka from following a common occupation of the community, and makes it a criminal offense for the Terraces to avail themselves of Nakatsuka's services in any capacity other than a mere wage earner, and prohibits them from making a lawful use of their property.

3. The act violates the equal protection clause of the Fourteenth Amendment, in that it makes a classification which bears no reasonable relation to a legitimate legislative end.

4. The act imposes an impossible condition, the declaration of intention in good faith to become a citizen of the United States, and hence Nakatsuka is freed from the obligation of compliance therewith.

5. The act is in violation of the Treaty between the United States and Japan, in that it prohibits the leasing of land for commercial purposes, and prohibits Nakatsuka from doing everything necessary for or incident to trade, on the same terms as citizens.

ARGUMENT.

I.

THE STATE CONSTITUTIONAL PROVISION IS EXCLUSIVE OF ALL DISABILITIES OF ALIENS RESPECTING LANDS AND THE LEGISLATURE HAD NO POWER TO ADD THERETO.

Section 33 of Article II of the Constitution of the State of Washington relating to alien ownership of land, has been before the Supreme Court of the state a number of times and its meaning and purpose has been definitely settled by the court. Those decisions chronologically arranged are as follows:

Oregon Mortgage Company vs. Carstens, 16 Wash. 165:

In that case, the mortgage company, an alien corporation, took a mortgage on real estate as security for the payment of money loaned. The mortgagor was unable to pay the mortgage and he and the mortgagee company entered into an agreement by the terms of which he executed a deed of the land to one Livingstone, as trustee for the plaintiff, and Livingstone subsequently deeded the land to the plaintiff mortgage company, and it entered into a written agreement to sell the land to Carstens and Carstens to buy the land of the mortgage company.

Carstens thereafter declined to pay the purchase price and the mortgage company brought suit to recover the amount thereof. The court held:

1. A deed to an alien, in violation of law, will pass a title to real estate good against all the world except the state, and one which only can be attacked in a direct proceeding on the part of the state.

2. An alien holding land in this state under a defeasible title, which is subject to attack on the part of the state as in contravention of the above constitutional provision, may by deed transfer a good title thereto to any person entitled to hold real estate, if no proceeding has been taken by the state for the purpose of setting aside the deed to the alien.

3. The above constitutional provision does not apply to cases in which a citizen deeds to an alien mortgaged land in satisfaction of *bona fide* mortgage debt, because the provision excepts from the prohibition upon alien ownership lands acquired "under mortgage or in good faith in the ordinary course of justice in the collection of debts."

In the course of its opinion the court said:

"The plaintiff contends that this land was acquired within the exception contained in the constitutional provision; that is, that the title was acquired under mortgage or in good faith in

the ordinary course of justice in the collection of a debt. It is conceded that McIntosh was the owner of the lands in fee simple, and that the deeds were all sufficient in form to convey the title. *It is plain that the purpose of the prohibition is to prevent the acquisition of lands in large quantities by alien and non-residential owners.* It is apparent by the exception referred to that it was not intended that the provision should be construed so as to prevent the loaning of money by aliens upon real estate security within this state; *but it was contemplated that such loans should be permitted and protected,* of course with the limitation that such transactions must be bona fide. In this case there is no claim of any bad faith, but the question is whether, in the case of an actual loan made, an alien can take a direct deed from the mortgagor of the land in satisfaction of the mortgage debt, or whether he must proceed to acquire title by a foreclosure in the courts.

"It will readily be seen, that an agreement such as was here entered into between McIntosh and the plaintiff would usually tend to the advantage of both parties. The costs of the foreclosure suit would be avoided, and as well the liability to a deficiency judgment upon the part of the mortgagor. It would seem that there could be but two objections urged against it as tending to defeat the purpose of the provision. One is that, in case of a foreclosure in the courts, the mortgagor would have a right to redeem the premises. But this is a personal right which he might or might not exercise, at his option. We presume it will be conceded that he could waive the right to redeem after a judgment of foreclosure, and we see no reason why he should not be permitted to waive this right

at any time, if he should deem it to his advantage in order to avoid costs and a liability for a deficiency. The other objection is that, in case of a foreclosure and public sale thereunder, other parties would be entitled to bid for the lands and the result might be, in consequence of this, that the alien plaintiff would not become the purchaser."

"The respondent contends that, if a proceeding like this can be sustained, it would be an easy matter for an alien desiring to obtain a tract of land in this state to go through the form of making a loan thereon and immediately thereafter take a deed in satisfaction of the mortgage and thus avoid the prohibition. But we are unable to see why, in case of a fraudulent arrangement between the mortgagor and the mortgagee, such a proceeding could not as well be carried out through the form of a foreclosure. The loan could be made in so large an amount and so great a price bid for the lands upon the foreclosure sale thereunder as to prevent other parties from becoming purchasers, and it would seem that the provision could be as readily violated in the one case as in the other."

"Alien corporations are not prevented from acquiring and holding lands in this state in all cases, and the objections urged against this transaction are substantially only to the form of acquiring title to lands upon which mortgage security has been taken. *It is evident that the clause, 'and all conveyances of land hereafter made to any alien directly or in trust for such alien shall be void,' is limited by the other provisions contained in the section, and that it was not intended to prevent an alien from holding land under any circumstaces.* It simply goes to

the means or purpose of the alien in acquiring title. In other words, in cases like this, the original purpose must not have been to acquire title to the lands under the transaction or guise of a mortgage loan, but must have been in good faith to make the loan as a loan, and the mortgage taken as an incident merely to secure its payment, and the land acquired in good faith thereunder. It is apparent that the form of the conveyance is of little or no consequence, unless it should tend to defeat the purpose of the provision."

Answering the contention that land could be acquired under the constitution by process of mortgage foreclosure only, and not by direct deed from the mortgagor to the mortgagee in satisfaction of the indebtedness, the court said:

"The clause in the provision, 'in the ordinary course of justice in the collection of debts,' should not be held to require a proceeding in court in the case of a mortgage debt. The language used does not require it necessarily, and such a construction would go to the form rather than the substance of the transaction. It would afford little or no protection against an attempted fraudulent acquisition. While it is true that a foreclosure might result in a sale to a resident, it is a well known fact that the usual result is a sale to the mortgagee. There is no attempt or desire upon the part of the mortgagee to retain these lands. On the contrary it is attempting to dispose of them, and it is evident that the whole transaction has been conceived and carried out in the utmost good faith to collect its debt; and while a direct provision of the constitution as to the form of the

conveyance, even, could not be disregarded, there is none in the way here, and it will be time enough to inquire into the validity of such transactions when fraud is charged and the desired protection invoked by a proceeding upon the part of the state."

"It is not an unusual proceeding for a mortgagor to convey lands directly to a mortgagee in satisfaction of a mortgage debt, and, where the parties agree upon such a course, it would seem as though it should be favored in a case like this rather than discriminated against. The only just and effectual enforcement of the constitutional inhibition can be by a proceeding upon the part of the state to have the transaction adjudged fraudulent and invalid, and actual fraud of course could always be inquired into. It would be idle to assume that the state has not ample power to protect itself in such matters, and it might be just as necessary and desirable to resort to such a proceeding where title was acquired through the form of a mortgage foreclosure as in case of a direct deed by the mortgagor to the mortgagee."

Goon Gan vs. Richardson, 16 Wash. 373:

That case was a mortgage foreclosure, and the court held that the incapacity of a mortgagee, by reason of alienage, to take title to real estate, might be shown only in a suit by the state.

State ex rel. Winston vs. Morrison, 18 Wash. 664:

That was a direct proceeding by the state to set aside a ninety-nine year lease of real estate to an

alien who had not declared his intention to become a citizen of the United States. Granting the relief prayed for the court said:

> "It is conceded that the premises described in the lease do not fall within any of the exceptions enumerated in the proviso contained in the foregoing section. Respondent contends that it is only absolute ownership of certain kinds of realty which is prohibited; that the word 'conveyance' means the transfer of title to another and the instrument by which this is done. The question for determination is, what is the meaning of the section of the constitution under consideration? We have not been referred to a case at all similar to the one we are now considering. We think that the section must be given a reasonable interpretation. If a lease for a term of ninety-nine years can be sustained, then why not one for nine hundred and ninety-nine years? And it would seem to require little argument to demonstrate that if a lease for such a term can lawfully be made to an alien the constitutional prohibition against ownership of lands in this state by aliens becomes meaningless, and parties may indirectly accomplish a result which they are forbidden to do directly. After a vain search for authority bearing directly upon the question we have concluded that a lease of lands in this state to an alien for a reasonable term might be upheld, but that the lease in question is for an unreasonable term, and consequently void."

State ex rel. Winston vs. The Hudson Land Co., 19 Wash. 35:

This was a direct action by the state to set aside certain conveyances of real estate and a lease of real

estate for forty-nine years, to a corporation the majority of whose stockholders were aliens at the time of the commencement of the action, although at the date of the conveyance and the making of the lease, the majority of the stockholders of the corporation were citizens. After quoting the above constitutional provision, the court said:

> "It seems to us that this language is not susceptible of construction. *A plain policy was plainly enunciated by the constitutional convention. That policy was an inhibition of ownership of lands by aliens except as to the character of lands specially mentioned in the proviso,* and the constitutional convention, having in mind, no doubt, the attempt to evade this law which is made in this case, out of an abundance of caution inserted the last provision, viz, that
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> " 'Every corporation, the majority of the capital stock of which is owned by aliens, shall be considered an alien for the purpose of this prohibition.'
>
> "We cannot understand what meaning could be attached to this last provision of the act, if a corporation, the majority of the capital stock of which is owned by aliens, is allowed to become the owner of lands. It is contended by the appellant that, because a majority of the stock of this corporation was owned by citizens at the time the land was transferred to the corporation, it would work an injury and a hardship upon the corporation, and upon the owners of stock thereof to hold this transfer void, and that, had it been the intention of the constitutional convention to make such an application of the law as this, language more explicit could,

and surely would, have been used. We do not think that language more explicit could have been used. Presumably the members of the constitutional convention regarded this question as of great importance, and the article doubtless was passed after careful consideration and revision; and the whole article shows that it was the intention of the law that the *ownership* of lands by aliens should be prohibited, and that it could be prohibited despite of subterfuges which might be resorted to by aliens for the purpose of becoming such owners; and we have already seen the wisdom of the makers of the constitution in clothing this article in language which is so plain that it is not susceptible of judicial construction. First, attempts have been made, in the case just above referred to, by aliens to become owners of land through the medium of leases which in effect conferred ownership, and now the constitution is again sought to be avoided and benefits obtained under it by indirection, action which could not be obtained by direct action. We have no doubt that corporations have it within their power to protect themselves from the dire consequences and hardships which are suggested by appellant in his brief by reason of members of a corporation selling stock to aliens in the corporation; but, if they cannot, our laws confer certain benefits on, and exemptions to, corporations which are valuable, and if men see fit to enter into corporations for the purpose of doing business instead of doing it as individuals, and accept the benefits which the law confers upon the corporation, they must also accept the burdens which are incident to a corporate investment. But outside of all this, when it once becomes the established law that deeds of this character are void, members of corporations will not be quick

to obtain such deeds, and the hardships dilated on by the appellant will be more in theory than practice. But even if it be conceded that these hardships would have to be endured, the evident spirit of the constitution must be sustained. The broad doctrine is announced that the ownership of lands by aliens is inhibited. The exceptions to that rule are as plainly announced by the constitution. These transfers not falling within the exceptions, the conveyance must be held to be void. The lease for forty-nine years will be held void under the doctrine announced in *State ex rel. Attorney General vs. Morrison, supra.*"

Morrell vs. Superior Court, 33 Wash. 542:

In that case the court held that an alien corporation could not acquire real estate in this state by eminent domain.

Abrams vs. The State of Washington, 45 Wash. 327.

In that case it appears that Abrams, the plaintiff, in 1890, conveyed real estate in the State of Washington to Lou Graham, an alien, who died in 1903, intestate. In 1894, Graham filed her declaration of intention to become a citizen of the United States but never took any further steps to acquire citizenship. After the death of Graham, Abrams instituted the above action for the purpose of recovering possession of the property, basing his claim on the fact that the real estate had been

acquired by Graham while an alien and that she had never become a citizen. In the same case the State sought to escheat the property, because it had been acquired by Graham while an alien, basing its contention on the proposition that Graham's application to become a citizen was not made in good faith. The court held that the deed from Abrams to Graham conveyed an absolute title, so far as Abrams was concerned, and that the State not having sought to forfeit the property in question during the lifetime of Graham, could not do so after her death, but that her heirs took a fee simple title to the real estate. In the course of its opinion the court said:

> "The appellants the State of Washington and County of King claim title by escheat, on the theory, that Lou Graham was at all times an alien; that her declaration of intention to become a citizen of the United States was void; that she being an alien of notoriously bad character and an habitual violator of the law could not be held to have made such declaration of intention in good faith; that she was prohibited by the terms of our constitution from acquiring title to the real estate by purchase; that as against the state, the deed to her was void; that she had no inheritable blood and could not upon dying intestate transmit title to her alien heirs, and that the property by operation of law and without any proceeding in the nature of office found, upon her death escheated to the state. In view of our conclusions, it will not be neces-

sary for us to determine whether her declaration of intention was, in contemplation of our constitution, made in good faith. We will consider this case upon the theory that she never made any such declaration. Being an alien, it follows that she had no right to acquire title to real estate in this state by purchase, and the deed executed to her by the appellant Abrams was void in the sense that a forfeiture of the property might have been declared by the state at any time while it remained in her possession and under her control, she claiming title under such deed. This court, in substance, held that an alien holding lands in this state by purchase under a defeasible title, subject to attack on the part of the state, might by deed hold it, provided no proceeding had theretofore been taken by the state for the purpose of declaring a forfeiture or escheat. In other words, if Lou Graham, after receiving her deed from the appellant Abrams, had, for a good and sufficient consideration, conveyed the property to a third party entitled to receive title, the state of Washington could not therefore, by office found, have forfeited such title as against her grantee. The state could, however, at any time prior to such transfer, have succesfully intituted proceedings to declare a forfeiture and escheat.

"The question now before us is whether, by reason of the death of Lou Graham, the state has lost its right to institute proceedings in the nature of office found for the purpose of declaring a forfeiture and escheat, or whether such right still continues. Under our constitution, an alien, who has not in good faith made any declaration of intention to become a citizen of the United States, *may acquire title to real estate (1) by inheritance; (2) under mortgage*

or in good faith in the ordinary course of justice in the collection of debts; (3) in lands containing valuable mineral deposits, etc., and (4) in land necessary for mills and machinery to be used in the development of such mineral lands, and in the manufacture of the products therefrom. When the *constitution authorized* aliens *to acquire lands* in these several instances and methods, it was undoubtedly contemplated that they might acquire a *full and complete estate in fee simple,* which would include an estate of inheritance. If this be a correct interpretation, then the estates thus acquired could be transmitted by descent to the heirs of such aliens. It is contended by the state, however, that Lou Graham only acquired a defeasible estate to the land in question, and that, as she was an alien and did not at common law have inheritance blood, she could not transmit any title or estate to her alien heirs, although under the constitution they, as aliens, could receive. In other words, there existed a disability upon her part to transmit, and not upon their part to receive by inheritance. As above stated, the common law of England was so modified by the statute of 11 and 12 Will. III ch. 6, in the year 1700, as to enable English subjects to inherit from an alien. This statute having been enacted prior to the separation of the American colonies from the mother country, has become a part of the common law of this state, except in so far as it has been supplanted by our constitution or statutory enactments. Under this rule and without the provisions of our constitution, a citizen could inherit from an alien an estate held by such alien at the date of his death, even though it has been defeasible.

"When our constitution *conferred* upon

aliens the *right to inherit,* we interpret it to have *conferred* upon them a *full and complete right of inheritance,* which would imply not only the right in themselves to receive by such inheritance from a citizen, but also to receive by inheritance from an alien. Were we to place any other interpretation upon the constitution, the necessary result would be that where an alien, under its authority, had rightfully acquired a fee simple title to real estate, for instance by mortgage, or in good faith in the ordinary course of justice in the collection of a debt, and had immediately thereafter died intestate, his heirs, if aliens, would not be able to inherit such real estate, not because of any disability upon their part, but because their deceased ancestor had not inheritable blood enabling him to transmit title to them. Such an interpretation would result in a rule of law causing such property to escheat to the state whenever there was a failure of heirs who were citizens of the United States. No such contingency was contemplated by the framers of our constitution, nor by the people who adopted the same. Our conclusion is that, under our constitution, aliens are entitled to inherit real estate in this state, from, by, or through ancestors whether such ancestors be aliens or citizens. This being true, and the state having failed to forfeit the title of Lou Graham by proceedings in the nature of office found, at any time prior to her death, the real estate in controversy descended to her alien heirs who were authorized to receive the same and became entitled thereto, and the state thereupon lost its right to declare any escheat by forfeiture.

"Our conclusions are, (1) that the deed

from the appellant Abrams divested him of title to the property; (2) that at all times prior to alienation of the property by Lou Graham, or prior to her death, the state was entitled, by proceedings in the nature of office found, to have declared a forfeiture or escheat; (3) that the state, having failed to declare such forfeiture or escheat prior to her death, lost its right so to do; (4) that upon her death, the real estate descended to her alien heirs. In view of these conclusions, the judgment of the honorable superior court was right, and it is accordingly affirmed."

State ex rel Atkinson vs. World Real Estate Commerce Company, 46 Wash. 104:

That was a direct action by the state to escheat real estate. An alien had acquired title to the real estate, contrary to the above constitutional provision, and had conveyed the real estate to the defendant prior to the commencement of the above action. The court held that the alien had conveyed a valid and indefeasible title to the defendant and that upon such conveyance the state lost its right to escheat.

State ex rel Atkinson vs. Evans, 46 Wash. 219:

That was a direct proceeding by the state to escheat land, which it was admitted were not acquired under mortgage or execution, or by inheritance, but contained silicated clay, but it was con-

tended that such deposits were not "minerals, metals, iron, coal, or fireclay," within the meaning of the proviso of the constitutional provision. The court held that the lands were within the excepted class, and in its opinion quoted with approval from Cooley on Contitutional Limitations, as follows:

> "The rule applicable here is, that effect is to be given, if possible, to the whole instrument, and to every section and clause. If different portions seem to conflict, the courts must harmonize them, if practicable, and must lean in favor of a construction which will render every word operative, rather than one which may make some words idle and nugatory. This rule is applicable with special force to written constitutions, in which the people will be presumed to have expressed themselves in careful and measured terms, corresponding with the immense importance of the powers delegated, leaving as little as possible to implication. It is scarcely conceivable that a case can arise where a court would be justified in declaring any portion of a written constitution nugatory because of ambiguity. One part may qualify another so as to restrict its operation, or apply it otherwise than the natural construction would require if it stood by itself; but one part is not to be allowed to defeat another, if by any reasonable construction the two can be made to stand together. In interpreting clauses we must presume that words have been employed in their natural and ordinary meaning. As Marshall, Ch. J. said: 'The framers of the constitution, and the people who adopted it, must be understood to have employed words in their natural

sense, and to have intended what they said.' "

Prentice vs. How, 84 Wash. 156:

In that case the court reaffirmed the rule that only the state can question an alien's title to real estate, and then only prior to conveyance of the real estate by the alien.

Roger vs. Whitman, 56 Wash. 190, 193:

In that case the court held that the real estate of a citizen, who becomes expatriated, cannot be forfeited.

State ex rel Tanner vs. Staeheli, 112 Wash. 344:

That was a direct action by the state to escheat real estate to the state. The defendant was born in Switzerland and after he came to this country, his father was duly naturalized, and the defendant alleged that he supposed the naturalization of the father resulted in making him a citizen of the United States, that he exercised all the rights of a citizen until the year 1917, then he was required to respond for military service, and at that time he claimed exemption from military service on account of the fact that he was alien born, and was past twenty-one years of age when his father was naturalized. After the action was brought defendant filed his declaration of intention to become a citizen of

the United States, which was held unavailing, and a decree was entered for the state. In the course of its opinion the court said that

> "This land is agricultural land, not valuable for minerals or used for manufacturing purposes, and was not acquired by inheritance or under mortgage, or in the collection of a debt."

State ex rel Turner vs. Rychen, 113 Wash. 90:

That case is similar in all respects to the case last above cited, and the same result was reached by the court.

By the foregoing decisions, the following propositions are established:

1. The purpose of the constitutional provision is to prevent the acquisition of land in large quantities by aliens and non-resident owners, but it was not intended to prevent an alien from holding land under any circumstances.

2. An alien who has not declared his intention to become a citizen of the United States may acquire an absolute fee simple title to real estate in the State of Washington by inheritance, under mortgage foreclosure, in good faith in the ordinary course of justice in the collection of debts, and also to lands containing valuable mineral deposits, as

well as lands necessary for mills and machinery to be used in the development of such mineral lands, and in the manufacture of the products therefrom.

3. In all cases other than those last mentioned, a conveyance of real estate to an alien creates a defeasible title in the alien, and can be attacked only by the state, and by it only prior to conveyance by the alien.

4. An alien may lawfully lease land in the State of Washington for a reasonable term.

5. That the constitutional provision is self-executing.

Applying the familiar rule of construction, *expressio unius est exclusio alterius,* it follows that the act transcends the power of the legislature. When in the constitutional provision certain disabilities with respect to land were imposed upon aliens, it must have been the purpose of the framers of the constitution to make such disabilities exclusive on that subject. In other words, it was contemplated that only *ownership* of lands should be prohibited, and the legislature was thereby rendered powerless to impose other and further disabilities. The change effected by the provision makes this apparent. At common law an alien had

no inheritable blood; he could take title to real estate by grant or conveyance, but had no capacity to hold, and the lands were at once subject to forfeiture by the state upon office found.

Governeur vs. Robertson, 11 Wheat. 332.
White vs. Bunley, 20 Kan. 235.
Hauenstein vs. Leynham, 100 U. S. 483.
Abrams vs. State, 45 Wash. 327.

Hence, the constitutional provision was not necessary for such purposes. It cannot be said that it is a grant, because the State Supreme Court holds that it is prohibition.

Oregon Mortgage Co. vs. Carstens, (*supra*) 16 Wash. 165, 167:

Being a prohibition it must, according to familiar rules of construction, be given effect as such. The only way that can be done is by giving it the effect we urge. And that construction necessarily follows from the State Supreme Court decision in *State ex rel. Winston vs. The Hudson Land Co.* (*supra*) 19 Wash. 85, 86, where, speaking of the purpose of the provision, the Court said:

> "A plain *policy* was plainly enunciated, by the *constitutional convention.* That policy was on inhibition of *ownership* of lands by aliens except as to the character of lands specifically mentioned in the proviso. * * * "

In the case of *State ex rel Barker vs. Assurance Co.,* 251 Mo. 278, the court had under consideration the question of jurisdiction in injunction in aid of its jurisdiction in *quo warranto,* and quoted with approval from the decision of the Supreme Court of Ohio in the case of *State ex rel Ellis vs. Cuyahogo County,* 70 O. S. 341, as follows:

> "The present action is a resort to our original jurisdiction. That we have not original jurisdiction of suits for injunction is entirely clear. If the language of sec. 5573, Revised Statutes, should be thought appropriate to confer it, the effect to be given to that section would nevertheless be indicated by sec. 2 of Art. 4 of the Constitution, which ordains that 'it (the supreme court) shall have original jurisdiction in *quo warranto, mandamus, habeas corpus,* and *procedendo,* and such appellate jurisdiction as may be provided by law.' Applying to this grant the maxim, *expressio unius est exclusio alterius,* the conclusion is irresistible that the general assembly cannot add to the enumerable subjects of our original jurisdiction."

In the case of *Nunnemacher vs. State,* 129 Wis 190, the question before the court was of the power of the legislature to impose license taxes. The constitutional provision empowered the legislature to impose taxes upon property and in disposing of the question the court said:

> "This contention is that by sec. 1 of Article 8 of the Constitution taxes can only be levied on property. This provision is the only general

provision of the Constitution upon the subject, and reads as follows: 'The rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall prescribe.' The argument is that this provision, by the rule of *expressio unius est exclusio alterius,* prohibits the levy of any taxes in this State except taxes upon property; and that, as inheritance taxes are held to be excise taxes upon the right to take property, and not taxes upon property, they cannot be levied in this state. * * *

"In approaching the question we start with the familiar proposition that the legislature has all the usual and necessary governmental powers, including the power to levy taxes upon occupations, privileges, franchises, and the like, as well as upon property, unless such power has been taken away by the Constitution. There are no express words in the Constitution limiting taxation to property taxation, but the question is whether sec. 1 of Article 8, above quoted, has the effect of such a limitation under the familiar rule of construction, *expressio unius est exclusio alterius.* If we were compelled to decide this question upon the bare words themselves, without the help of the debates occurring in the constitutional convention when this section was formulated, and without the help of subsequent practical construction, the argument would be strong in favor of the plaintiff's contention. But we have a brief record of the constitutional debates, and we have fifty years of practical construction since the adoption of the Constitution and both must be considered."

The court then reviewed the debates in the Constitutional Convention at the time of the adoption of the above constitutional provision and con-

cluded therefrom that it was not the purpose of the constitutional convention to bar the legislature from imposing license taxes.

In this state there has been no legislation on the subject subsequent to the adoption of the constitution and prior to the enactment in question. But, on the other hand, the practical construction given the provision has always permitted the leasing of lands by aliens.

An examination of the constitution reveals the fact that when the convention contemplated legislation on or in connection with the subject of a constitutional provision, that fact was plainly stated.

When reading the Washington constitution, one is forcibly impressed with the fact that a large part of it consists of directions to the legislature to take affirmative action, which provisions are made mandatory by section 29 of Article I thereof, reading as follows:

> "The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise."

The appellee argues that a state constitution is merely a limitation of legislature power, and that by reason of that fact the rule we contend for does not apply. But, it has been observed that the Wash-

ington constitution is not drawn on the theory of being a limitation of legislative power, but that it is a mandatory direction, in a large part, to the legislature to take affirmative action.

In other words, the constitutional convention did not proceed on the theory that it was framing a series of limitations on legislative powers, but proceeded on the opposite theory, namely, that it was directing the legislature what it should do, and inserted a provision making all of the provisions of the constitution mandatory, unless in direct words they were stated to be otherwise. Therefore, the question is not disposed of by the application of the rule that a state constitution is merely a limitation of legislative power. That rule is not an unyielding one, but is adopted merely for the purpose of construction and in aid of a determination of the meaning of the instrument itself.

Again, an examination of the constitution reveals the fact, unmistakably apparent, that when the convention expected or intended action on the part of the legislature, that fact was plainly stated, and was not left to inference.

It is also to be borne in mind that the meaning of constitutions is to be sought in the plain language of the people who adopted them, and that the lan-

guage is to be taken in its general and ordinary sense, and as the people generally understand it.

In the case of *State ex rel Atkinson vs. Evans,* 46 Wash. 219, the court, in speaking of the provision in question, said:

> "In interpreting clauses we must presume that the words have been employed in their natural and ordinary meaning. As Marshall, Ch. J. said: 'The framers of the constitution, and the people who adopted it, must be understood to have employed words in their natural sense, and to have intended what they said.' "

In the case of *Bronson vs. Syverson,* 88 Wash. 264, 275, the court said:

> "As we said on another occasion, it is a cardinal rule of construction that the language of a state constitution, more than that of any other of the written laws, is to be taken in its general and ordinary sense. The reason for the rule lies in the fact that its makers are the people who adopt it. Its language is their language, and words employed therein have meaning as the generality of the people understand them. When, therefore, words are used in a constitution which have both a restricted and general meaning, the general must prevail over the restricted, unless the nature of the subject-matter or the context indicates that the limited sense was intended. Says Mr. Justice Story:
>
> " 'Every word employed in the constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it. Constitutions are not designed for metaphysical or

logical subtilities, for niceties of expression, for critical propriety, for elaborate shades of meaning, or for the exercise of philosophical acuteness or judicial research. They are instruments of a practical nature, founded on the common business of human life, adapted to common wants, designed for common use, and fitted for common understanding. The people make them, the people adopt them; the people must be supposed to read them, with the help of common sense, and cannot be presumed to admit to them an recondite meaning or any extraordinary gloss.' 1 Story, Constitution (5th ed.) Sec. 451.

"So Sedgwick in his work in Constitutional Law:

" 'In the consideration of these questions it may be observed in the first place, that, in the construction of a constitution the rule is, 'its terms must be taken in the ordinary and common acceptation, because they are supposed to have been so understood by the framers and by the people who adopted it. This is unquestionably the correct rule of interpretation. It, unlike the acts of our legislature, owes its whole force and authority to its ratification by the people; and they judge it by the meaning apparent on its face according to the general use of the words employed, when they do not appear to have been used in a legal or technical sense.'

"In 6 R. C. L. 52, under title, 'Constitutional Law,' it is said:

" 'Words or terms used in a constitution, being dependent on ratification by the people, must be understood in the sense most obvious to the common understanding at the time of its adoption, although a different rule might be

> applied in interpreting statutes and acts of the legislature. This gives rise to the recognized rule of construction that it is presumed that words appearing in a constitution have been used according to their plain, natural and usual signification and import, and the courts are not at liberty to disregard the plain meaning of words of a constitution in order to search for some other conjectured intent. This rule does not apply, however, to technical words and phrases which necessarily should be given a technical signification.' "

If the foregoing rule be followed, and if the purpose of the framers of the constitution be sought with the idea in mind that constitutional provision must be interpreted in the light of the plain general meaning of the terms used, it must necessarily follow, that to the ordinary mind the expression of one disability carries with it the idea of permission of those things not prohibited. This, indeed, is merely the application of the common understanding of the use of language, when understood in its general meaning.

Referring again to the provision in question, it will be observed that the last sentence thereof reads as follows:

> "Every corporation, the majority of whose capital stock is owned by aliens, shall be considered an alien for the purpose of this prohibition."

It is impossible to read that sentence without receiving therefrom the impression that the framers of the constitution intended the disability therein created to be the only disability which should attend alien ownership of stock in corporations. We submit and it cannot be doubted, on the application of any applicable rule of construction, that the legislature has no power to add to the prohibition of the foregoing provision. And if that conclusion be sound, and we cannot doubt that it is, it renders certain the ultimate conclusion that when the framers of the constitution adopted the section in question, it was their purpose to make the disabilities therein enumerated exclusive, and not to leave to the legislature power to add thereto.

In the case of *United States vs. Arrendondo,* 6 Peters, 691, 725, this court said:

> "*Expressio unius est exclusio alterius,* is an universal maxim in the construction of statutes."

That maxim has been applied, as the reported cases show, in the construction of constitutions as well as of legislative acts. And we submit that the rule is applicable to the constitutional provision in question, and that when it is applied it results in the conclusion that the legislature has not power to prohibit the leasing of lands by citizens to aliens

and by aliens from citizens.

It must be remembered that the questions arising out of the presence of aliens on the Pacific Coast was one with which the people were familiar at the time of the adoption of the constitution of the State of Washington. The records show that such questions had even reached this court for decision. It must be assumed that the framers of the Washington constitution were familiar with the questions arising from residence of aliens in the state and that the constitutional provision in question was adopted after mature and deliberate consideration. So assuming, when the framers of the constitution deliberately adopted a *policy,* as the state supreme court held, respecting lands and aliens it necessarily follows that the policy as adopted was intended to be the policy of the new state, with respect to the right of alien in or to lands or their use.

The lower court, after citing some of the Washington decisions heretofore cited in this brief used the following language:

> "From the foregoing, it is clear that the supreme court of Washington has held the common law only changed by this constitutional provision to the extent plainly exercised therein. The exceptions in the constitutional provision constitute a grant to the alien and, of course, are not subject to legislative change or

limitation, at least by the State. But it does not follow because the constitution prohibits alien 'ownership' of lands with certain exceptions, that, the constitution not having defined what shall constitute ownership, the legislature may not do so. The legislature is not bound to leave courts to speculate upon that subject."

Clearly that conclusion is not well founded because there exists in the constitutional provision no ambiguity as to what was meant by "ownership;" ownership with respect to real estate can mean just one thing and that is ownership, the meaning of which everybody knows and understands. But, if the legislature had the right to define what "ownership" meant then it was the right without limitation. Suppose the legislature, instead of passing the act in question, had in an act defined ownership within the meaning of the constitutional provision as any term of years not exceeding one hundred, during which the alien might exercise every right incident to ownership of land in the State of Washington; would anyone for a moment contend that the legislature had power so to do? Suppose the legislature had provided that aliens holding a defeasible title to land might hold the same during their lives and the lives of heirs then in existence; would anyone argue that the legislature had power so to do?

Again, it will be observed that when a matter

was made the subject of a constitutional provision, which the framers of the constitution intended should be permitted or prohibited, under such regulations as the legislature should provide, the fact was plainly stated, and not left to inference. This is true even of matters on which the legislature, without limitation in the constitution, would have had absolute power. Therefore, if it had been the purpose of the framers of the constitution to prohibit the possession, use, control, leasing or enjoyment of the rents, issues and profits of real estate, the context of the entire constitution shows that such fact would have been plainly stated in the constitution, as it was in other matters, which were the subject of a constitutional provision. When, therefore, a plain policy was enunciated by the constitutional convention, and when that policy was a prohibition of *ownership* of land by aliens, and when the constitutional convention did not expressly provide that the use, possession, control, leasing, and enjoyment of rents, issues and profits of real estate was subject to legislative prohibition, it must follow that the policy so established by the legislature was exclusive, and that the matter was not left to legislative action.

We respectfully submit that the legislature has

no power to enact the measure in question.

II.

THE ACT TAKES THE PROPERTY OF THE PARTIES WITHOUT DUE PROCESS OF LAW, IN THAT IT PROHIBITS NAKATSUKA FROM FOLLOWING A COMMON OCCUPATION OF THE COMMUNITY, AND MAKES IT A CRIMINAL OFFENSE FOR THE TERRACES TO AVAIL THEMSELVES OF NAKATSUKA'S SERVICES IN ANY CAPACITY OTHER THAN A MERE WAGE EARNER, AND PROHIBITS THEM FROM MAKING A LAWFUL USE OF THEIR PROPERTY.

It has seemed to us that all that is necessary to dispose of the question in this case is the application of fundamental principles. Among such are the due process clause of the Fourteenth Amendment and a similar clause to the constitution of the State of Washington. The meaning of the due process clause of the Fourteenth Amendment has been so often stated by this court that a citation of authorities is unnecessary, but it may be of assistance to notice the plain, unequivocal language in which this court has declared its effect.

In the case of *Butchers' Union Slaughter House and Live Stock Landing Company vs. Crescent City Live Stock Landing and Slaughter House Company*, 111 U. S. 746, 754, Mr. Justice Bradley used lan-

guage which has been frequently quoted by this court with approval, and never, so far as we can find, has his statement been questioned:

> "The right to follow any of the common occupations of life is an inalienable right, it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'All men are created equal; that they are endowed by their Creator with certain inalienable rights; that among those are life, liberty and *the pursuit of happiness.*' This right is a large ingredient in the civil liberty of the citizen."

To the same effect are:

Barbier vs. Connolly, 113 U. S. 27, 31.

Powell vs. Pennsylvania, 127 U. S. 678, 699.

Allgeyer vs. Louisiana, 165 U. S. 578, 589.

Yick Wo vs. Hopkins, 118 U. S. 356, 370.

Coppage vs. Kansas, 236 U. S. 1, 14, 19.

Truax vs. Raich, 239 U. S. 33, 41.

It cannot be disputed that working on a farm and farming and the raising of agricultural products is one of the common occupations of the United States and particularly the State of Washington. It may be stated without fear of contradiction, that the right of an alien to work on a farm for wages is a right which no act of legislature could prohibit. Having the right so to work, no act of the legislature

could prohibit him from receiving compensation therefor, as, to prohibit him from receiving compensation for his work, would be equivalent to prohibiting him from working.

Adams vs. Tanner, 244 U. S. 590.

The amount of compensation to be paid is a matter wholly of agreement between the parties. Hence, if the employer is willing to give to the alien, and the alien is willing to accept, a percentage of the net profits produced by the combined work of the employer and the employee, such a contract may be lawfully entered into and cannot be prohibited by the legislature. We are assuming, of course, that the alien is neither a minor nor a person of unsound mind. It is perfectly clear that if a citizen, owning agricultural lands, desires to employ an alien as superintendent of his agricultural operations and the alien is willing to perform the duties thereof, such a contract may be made and cannot be prohibited by the legislature. It is also clear that the compensation, in such cases, to be paid for such services is a matter of contract between the parties; that it may be fixed at a stipulated sum in money payable at such time or times as is agreed; or that it might be fixed at a percentage, of the receipts, net or gross, resulting from such operation. It is

equally clear that if a citizen land owner desires to absent himself from the scene of his agricultural operations, he may lawfully enter into a contract with an alien by the terms of which the alien would become obligated to carry on the agricultural operations of the land owner, and in his name and for his use, and to account to the land owner at a stipulated time or times for the money received from such operation; it is equally clear that the compensation to be received by the alien therefor is a matter purely of contract, and may be fixed at a stipulated sum in money or a percentage of the net or gross receipts arising from the operation, as the parties may agree. It is confidently asserted that an alien has a right to do the acts mentioned in the foregoing instances, and that an act preventing him from doing any of them would be in contravention of the 14th Amendment. Indeed, we do not understand that the Attorney General contends the contrary. Now, suppose that the citizen landowner, instead of desiring to enter into a contract employing the alien to work as a farm laborer or as a superintendent of the farming operations, should desire instead to enter into a contract with the alien by which the alien should do exactly the same thing, that is, obligate himself to farm the land in question,

but, instead of receiving wages from the land owner, or accounting to him for the receipts from the operations, the parties should enter into an agreement by the terms of which the alien agreed to farm the land and to pay the land owner a stipulated sum in money as his share of the profits from said operations. Can it be said. under such circumstances, that the alien is any the less engaged in working as a farm hand than he would be in any of the preceding illustrations suggested? If there is a distinction to be drawn, what is the basis of such distinction? If it be suggested that in the latter case an estate in land is created, the obvious answer is that the Supreme Court of the State in the case of *Tibbals vs. Iffland,* 10 Wash. 451, 457, has held that a lease does not create an estate in land. The further obvious answer is that to create a legal distinction between the two acts is to relegate substance to form, contrary to all of the decisions of this court on constitutional questions.

That the effect of the decision of the Supreme Court in the case of *Tibbals vs. Iffland, supra,* 10 Wash. 451, 457, may not be mistaken, attention may be called to the fact that section 5918 of Remington & Ballinger's Code entrusts the management and control of community real property to the husband

but prohibits him from selling, conveying, or encumbering the community real estate unless the wife join with him in executing the deed or other instrument of conveyance by which the same is sold, conveyed, or encumbered, and requires such deed or instrument of conveyance to be acknowledged by him and his wife. Section 8745 of Remington & Ballinger's Code requires all conveyances of real estate or of any interest therein, and all contracts creating or evidencing any encumbrances upon real estate, to be by deed. The court had before it for decision the question of the validity of an assignment of a lease made by the husband alone. It was contended that the assignment was invalid because the lease was community property and the wife had not joined in the assignment. The court disposed of the question in these words:

> "The respondent was a married man, he had the same right to assign and transfer the lease that he had to dispose of chattels generally, without the consent of his wife (Gear, Landlord and Tennant, sec. 183), and if he was unmarried he could, of course, make such disposition of it as he saw fit. It was therefore immaterial whether he was married or not, so far as the right to make the assignment was concerned."

There is nothing peculiar, in the State of Washington, in the holding that a lease creates no interest

in real estate. The Supreme Court of the State has uniformly held that a contract for the sale and purchase of real estate on deferred payments creates neither a legal nor equitable interest in the real estate. In the case of *Tieton Hotel Co. vs. Manheim,* 75 Wash. 641, 642, the court said:

> "It is a settled rule in this state that executory contracts for the sale and purchase of land do not convey title, either legal or equitable. *Reddish vs. Smith,* 10 Wash. 178, 38 Pac. 1003, 45 Am. St. 781; *Pease vs. Baxter,* 12 Wash. 567, 41 Pac. 899; *Churchill vs. Ackerman,* 22 Wash. 227, 60 Pac. 406; *Johnson vs. Sekor,* 53 Wash. 205, 101 Pac. 829; *Younkman vs. Hillman,* 53 Wash. 661, 102 Pac. 773."

It is confidently submitted that, when a lease does not in fact create an interest in real estate, the legislature is powerless to create, by the terms of a lease, that which the instrument itself does not.

In the case of *O'Brien vs. Webb,* 279 Fed. 117, 123, Judge Dooling, speaking for the court in the cropping contract case growing out of the California alien land act, said:

> "It would be indeed a strain to say that an alien may not enter into a contract for agricultural purposes; unless, of course, the law is very clear and unambiguous in preventing him from doing so. Being lawfully within the United States and lawfully an inhabitant of the state of California, his right to the ordinary pursuit of agriculture is not to be deemed curtailed,

provided, always he does not acquire an interest in the land which he is cultivating."

The foregoing is equivalent to the statement that the constitutional right of an alien, lawfully within the United States, to follow any of the ordinary occupations of the country, is confined to the right to work for wages, for another, and that the constitutional right does not extend to an alien's working for himself. The constitutional right of the alien cannot be so limited.

We respectfully submit that the prohibition of the act is contrary to the due process clause of the Fourteenth Amendment, because it is, in effect, a prohibition of the right of an alien to engage in one of the common occupations of life.

The foregoing has been written from the point of view of the alien, but the applicability of the due process clause to the right of the citizen land owner is no less distinct. It is alleged in the bill that the Terraces acquired this property prior to the passage of the act. The direct prohibition of the act extends to any use of the property in connection with an alien. According to the act, the Terraces may not give to their co-plaintiff possession or control or the right to use their real estate, for any purpose whatsoever, for any period of time, however short.

In other words, the property was acquired prior to the passage of the act, and at a time when it might validly and lawfully be leased to a Japanese, but the act now prohibits them so doing by the severest of penalties, both civil and criminal. Their right to use their property in a lawful way has been proscribed by the act, and the highly beneficial use which they had a right to make of the property at the time of its acquisition, has been absolutely cut off. It must be remembered that there is in the leasing of lands to Japanese nothing inherently wrong, but the act is merely *malum prohibitum,* in response to one of those demands which have been so frequently the cause of the passage of the most extreme legislation. In other words, in response to a popular demand, the right to the Terraces to make an inherently lawful use of their land has been cut off, without any recourse whatever therefor. The right of each of the parties to this action, under the due process clause, has been cut off by the terms of the act, and on familiar principles each of them may urge the invalidity of the act from the viewpoint of the other.

In the case of *New York Central Railroad Co. vs. White,* 243 U. S. 188, 197, the court said:

> "In considering the constitutional question, it is necessary to view the matter from the

standpoint of the employee as well as from that of the employer. For, while plaintiff in error is an employer, and cannot succeed without showing that its rights as such are infringed (*Plymouth Coal Co. vs. Pennsylvania,* 232 U. S. 531, 544, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359; *Jeffrey Mfg. Co. vs. Blagg,* 235 U. S. 571, 576, 59 L. ed. 364, 368, 55 Sup. Ct. Rep. 167, 7 N. C. C. A. 570), yet as pointed out by the court of appeals in the *Jensen Case* (215 N. Y. 526), the exemption from further liability is an essential part of the scheme, so that the statute, if invalid as against the employee, is invalid as against the employer."

In the case of *Mountain Timber Company vs. State of Washington,* 243 U. S. 219, 234, this court said:

"While plaintiff in error is an employer, and cannot succeed without showing that its constitutional rights as employer are infringed (*Plymouth Coal Co. vs. Pennsylvania,* 232 U. S. 531, 544, 58 L. ed. 713, 719, 34 Sup. Ct. Rep. 359; *Jeffrey Mfg. Co. vs. Blagg,* 235 U. S. 571, 576, 59 L. ed. 364, 368, 35 Sup. Ct. Rep. 167, 7 N. C. C. A. 570), yet it is evident that the employer's exemption from liability to private action is an essential part of the legislative scheme and the *quid pro quo* for the burdens imposed upon him, so that if the act is not valid as against employees it is not valid as against employers."

In the case last cited no employee was a party to the action, although the court considered the act from the standpoint of an employee.

In the case of *Truax vs. Raich,* 239 U. S. 33, it was contended that the employee could not urge the unconstitutionality of the act from the standpoint of the employer. But this court held that, in view of the fact that the act affected the right of both employer and employee, the employee in his action might urge the unconstitutionality of the act from the standpoint of the employer, although the latter was not a party to the action.

In the case of *Buchanan vs. Warley,* 245 U. S. 60, 72, this court said:

> "The property here involved was sold by the plaintiff in error, a white man, on the terms stated, to a colored man; the action for specific performance was entertained in the court below, and in both courts the plaintiff's right to have the contract enforced was denied solely because of the effect of the ordinance making it illegal for a colored person to occupy the lot sold. But for the ordinance the state courts would have enforced the contract, and the defendant would have been compelled to pay the purchase price and take a conveyance of the premises. The right of the plaintiff in error to sell his property was directly involved and necessarily impaired because it was held in effect that he could not sell the lot to a person of color who was willing and ready to acquire the property, and had obligated himself to take it. This case does not come within the class wherein this court has held that where one seeks to avoid the enforcement of a law or ordinance he must present a grievance of his own, and not rest the attack

> upon the alleged violation of another's rights. In this case the property rights of the plaintiff in error are directly and necessarily involved."

It stands undisputed that the Terraces own the property in question. Of course, ownership carries with it the right to use the property in all lawful ways. In the case of *Buchanan vs. Warley,* 245 U. S. 60, 74, this court said:

> "Property is more than the mere thing which a person owns. It is elementary that it includes the right to acquire, use, and dispose of it. The Constitution protects those essential attributes of property. *Holden vs. Hardy,* 169 U. S. 376, 391. Property consists of the free use, enjoyment and disposal of a person's acquisitions without control or diminution save by the law of the land."

It cannot be disputed that a very substantial limitation of the right of the Terraces to use their property results from the provisions of the act prohibiting the leasing of lands to aliens.

In the *Buchanan* case this court held that the legislature could not prohibit a white man from selling his property to a colored man and that an act prohibiting the same was in violation of the due process clause and held that that clause protected persons of color as well as white persons. The act in question, in its ultimate effect, prohibits the Terraces from placing their co-complainant in

charge of their property for any length of time whatever and the sole reason for so doing is because such co-complainant is an Oriental; in other words, the prohibition is based entirely on color. Unless, therefore, such a prohibition may be based entirely on color, clearly the act is void. We will now consider that question.

III.

The Act Violates the Equal Protection Clause of the Fourteenth Amendment, in that it Makes a Classification Which Bears No Reasonable Relation to a Legitimate Legislative End.

The appellants invoke the equal protection clause of the Fourteenth Amendment of the Constitution of the United States.

If the act is in violation of the equal protection clause, so far as concerns the alien appellant, the Terraces may invoke the same protection, because their property rights are interfered with by the act.

Buchanan vs. Warley, 245 U. S. 60.

If we understand the decision of the District Court, that court held that the act makes no discrimination whatever, but that all aliens are treated

alike. On pages 19 and 20 of the record, the court said:

> "Still less does the Washington act discriminate against the Japanese for it provides that
>
> " 'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States.
>
> "The prohibition by this definition is made applicable to all aliens both those eligible and those not eligible to citizenship, provided that they have not declared their intention to become citizens. To this extent, the present suit is to be distinguished from *In re Ah Chong* (2 Fed., 733) * * *
>
> "The present case is not only to be distinguished from the *Chong* case because of the fact that the present law is made applicable to all aliens and there is no punishment by imprisonment or a fine of the alien grantee of lands."

Beyond any possibility of question, the act divides aliens into two classes, namely, those who may and those who may not become citizens of the United States. To each of the former class is extended all rights of citizens with respect to real estate, upon the filing a declaration of intention, while the bar of the statute is absolute as to the latter class, because none of them can at any time in good faith file a declaration of intention. If our view of the meaning of the foregoing quotation is correct, we

shall content ourselves with permitting its statement to stand as its own answer. Hence, we shall consider the discrimination made by the act.

Excepting (1) the right of the state to prohibit the ownership of lands within its border, there being no treaty to the contrary, (*Chirac vs. Chirac,* 2 Wheat, 259, 272; *Hauenstein vs. Lyman,* 199 U. S. 483, 484; *DeVaughn vs. Hutchinson,* 165 U. S. 565; *Clarke vs. Clarke,* 178 U. S. 186; *Blythe vs. Blythe,* 180 U. S. 333); (2) the right of the state to limit the right to take the common property of the state, such as game and fish, to citizens of the state, (*McCready vs. Virginia,* 94 U. S. 391; *Patsone vs. Pennsylvania,* 232 U. S. 138); (3) the right of the state, and (there being no statute to the contrary) of any municipality therein to employ none but citizens on public work, (*Atkin vs. Kansas,* 191 U. S. 207; *Heim vs. McCall,* 239 U. S. 173); and, (4) the power to limit the right of the franchise to citizens of the state, (*Yick Wo vs. Hopkins,* 118 U. S. 336, 370); aliens are within the equal protection clause as fully as citizens. In view of the fact that the Attorney General asserts the absolute right of the state to deal with aliens, because of alienage and of the subject matter of the act, as it may desire, we shall call attention to (and we trust we may be

pardoned for quoting from) the applicable authorities in support of the foregoing statement of the effect of the equal protection clause.

In *Ex parte Virginia,* 100 U. S. 339, 345, in speaking of the Thirteenth and Fourteenth Amendments, said:

> "They were intended to take away all possibility of oppression by law because of race or color."

In the case of *Yick Wo vs. Hopkins,* 118 U. S. 356, 359, this court said:

> "The Fourteenth Amendment to the Constitution is not confined to the protection of citizens. It says: 'Nor shall any State deprive any peron of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.' These provisions are *universal* in their application, to any difference of *race, color,* or of *nationality;* and the equal protection of the laws is a pledge of the protection of equal laws. It is accordingly enacted by section 1977 of the Revised Statutes, that, 'All persons within the jurisdiction of the United States shall have the right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.' The questions we have to consider and decide in these cases, therefore, are to be treated as in-

volving the rights of *every citizen* of the United States *equally* with those of the strangers and *aliens* who now invoke the jurisdiction of the court." (Italics ours.)

In the case of *Fong Yue King vs. United States,* 149 U. S. 698, 724, this court said:

"By the law of nations, doubtless, aliens residing in a country, with the intention of making it a permanent place of abode, acquire, in one sense, a domicile there; and, while they are permitted by the nation to retain such a residence and domicile are subject to its laws, and may invoke its protection against other nations. This is recognized by those publicists who, as has been seen, maintain in the strongest terms the right of the nation to expel any or all aliens at its pleasure. (Citing authorities.)

"Chinese laborers, therefore, like *all other aliens* residing in the United States for a shorter or longer time, are entitled, so long as they are permitted by the government of the United States to remain in the country to the safeguards of the Constitution, and to the protection of the laws, in regard to their rights of person and of property, and to their civil and criminal responsibility."

In the case of *Wong Wing vs. United States,* 163 U. S. 228, 242, this court said:

"A resident, alien born, is entitled to the same protection under the laws that a citizen is entitled to. He owes obedience to the laws of the country in which he is domiciled, and, as a consequence, he is entitled to the equal protection of those laws."

"This has been decided so often that the point does not require argument." (Citing authorities.)

"The contention that persons within the territorial jurisdiction of this republic might be beyond the protection of the law was heard with pain on the argument at the bar, in face of the great constitutional amendments which declared that no state shall deny to any person within its jurisdiction the equal protection of the laws."

In the case of *United States vs. Wong Kim Ark,* 169 U. S. 649, 694, this court said:

"Chinese persons, born out of the United States, remaining subjects of the Emperor of China, and not having become citizens of the United States, are entitled to the protection of and owe allegiance to the United States, so long as they are permitted by the United States to reside here; and are 'subject to the jurisdiction thereof' in the same sense as all other aliens residing in the United States." (Citing authorities.)

In the case of *American Sugar Refining Company vs. Louisiana,* 179 U. S. 89, 92, this court said:

"The act in question does undoubtedly discriminate in favor of a certain class of refiners, but this discrimination, if founded upon a reasonable distinction in principle is valid. Of course, if such discrimination were purely arbitrary, oppressive, or capricious, and made to depend upon difference of color, *race, nativity,* religious opinions, political affiliations, or other considerations having no possible connection with the duties of citizens as tax payers, such

exemption would be pure favoritism and a denial of the equal protection of the laws to the less favored classes." (Italics ours.)

In the case of *Truax vs. Raich,* 239 U. S. 33, 39, this court said:

> "Being lawfully an inhabitant of Arizona, the complainant is entitled under the 14th Amendment to the equal protection of its laws. The description, 'any person within its jurisdiction' as has frequently been held, includes aliens. 'These provisions,' said the court in *Yick Wo vs. Hopkins,* 118 U. S. 356, 369 (referring to the due process and equal protection clauses of the Amendment) 'are universal in their application, to all persons within the territorial jurisdiction, without regard to any difference of race, of color, or of nationality; and the equal protection of the laws is a pledge of the protection of equal laws.'"

In the case of *Buchanan vs. Warley,* 245 U. S. 60, 76, this court said:

> "While the principal purpose of the latter (Fourteenth) Amendment was to protect persons of color, the broad language used was deemed sufficient to protect all persons, white or black, against discriminatory legislation by the states. This is now the settled law."

In the case of *Re Tiburcio Parrott,* 1 Fed. 481, there was involved a provision of the California constitution prohibiting corporations formed under the laws of that state from employing, directly or indirectly, in any capacity any Chinese or Mon-

golians, and an act of the legislature passed to enforce the same. While it may be said that no state can lawfully prohibit any alien lawfully residing within the state from working at any of the common occupations of the state, and cannot accomplish the same results by the indirect method of prohibiting anyone from employing such alien, it may not be amiss to notice the no uncertain terms in which both the constitutional provision and the act of the legislature were condemned. On page 492, Judge Hoffman used the following language:

> "Can it be pretended that this law, of the effect of which I have given examples, is reasonable as between the state and the corporations, without regard to the treaty rights of Chinese residents. Can it be said to be in good faith—that is, in the fair and just exercise of the reserved power to regulate corporations for the protection of the stockholders, their creditors, and the general public? Is it not rather an attempt, 'under the guise of an amendment or alteration' to attain quite a different and, as I shall presently show, an unconstitutional object, viz: Two to drive the Chinese from the state, by preventing them from laboring for their livelihood? I apprehend that, to these questions but one candid answer can be given. I am, therefore, of opinion that, irrespective of the rights secured to the Chinese by the treaty the law is void, as not being a 'reasonable' *bona fide,* or constitutional exercise of the power to alter and amend the general laws under which corporations in this state have been formed; that it would be equally invalid if the proscribed

class had been Irish, German, or American; that the corporations have a constitutional right to utilize their property, by employing such laborers as they choose, and on such wages as may be mutually agreed upon; that they are not compelled to shelter themselves behind the treaty right of the Chinese, to reside here, to labor for their living, and accept employment when offered; but they may stand firmly on their own right to employ laborers of their choosing, and on such terms, as may be agreed upon, subject only to such police laws as the state may enact with respect to them, in common with private individuals."

In the same case, on page 509, Judge Sawyer, in speaking of the Fourteenth Amendment and Section 1977 of the Revised Statutes, said:

> "It will be seen that in the latter clause the words are 'any person' and not 'any citizen' and prevents any state from depriving 'any person' of life, liberty or property without due process of law, or from denying to 'any person within its jurisdiction the equal protection of the laws.' In the particulars covered by these provisions it places the right of every person within the jurisdiction of the state, be he Christian, heathen, civilized or barbarous, Caucasian or Mongolian, upon the same secure footing and under the same protection as are the rights of citizens themselves under other provisions of the constitution."

Further, speaking of the decision of this court in the case of *Strouder vs. West Virginia,* the eminent Jurist continued thus:

"In speaking of the act to enforce this amendment, the court further says: Sections 1977 and 1978 of the Revised Statutes, before cited, 'partially enumerate the rights and immunities intended to be guaranteed by the constitution;' and that 'this act puts in the form of a statute what had been substantially ordained by the constitutional amendment.' Id. 228. If this exclusion of colored men from sitting upon a jury by *implication* is a violation of the constitution, as denying the equal protection of the laws to colored persons, *a fortiori* must express the positive provisions of the constitution and act of the legislature of the State of California be in conflict with that instrument, as denying the equal protection of the laws to the Chinese residents of the State. Upon reason and these authorities, then, it seems impossible to doubt that the provisions in question are both, in letter and spirit, in conflict with the constitution and laws of the United States, as well as with the stipulations of the treaty with China, and this constitutional right is wholly independent of any treaty stipulations, and would exist without any treaty whatever, so long as Chinese are permitted to come into and reside within the jurisdiction of the United States. The protection is given by the constitution itself and the laws passed to give it effect, irrespective of treaty stipulations."

In the case of *Ah Kow vs. Nunan,* 5 Sawy. 552, there was under consideration an ordinance of the City of San Francisco, commonly known as the queue ordinance, which required the hair of each Chinese to be clipped within an inch of his head.

Mr. Justice Field, in holding the ordinance unconstitutional, said:

> "But in our country, hostile and *discriminating legislation* by a state against persons of any class, sect, creed, or nation, in whatever form it may be expressed, *is forbidden by the Fourteenth amendment to the constitution.* That amendment in its first section declares who are citizens of the United States and then exacts that no state shall make or enforce any law which shall abridge their privileges and immunities. It further declared that no state shall deprive *any person* (dropping the distinctive term citizen) of life, liberty, or property, without due process of law, nor deny to *any person* the equal protection of the laws. This inhibition upon the state applies to all the instrumentalities and agencies employed in the administration of its government, to its executive, legislative, and judicial departments, and to the subordinate legislative bodies of counties and cities. And the equality of protection thus assured to every one while within the United States from whatever country he may have come, or of whatever race or color he may be, implies not only that the courts of the country shall be open to him on the same terms as to all others for the security of his person or property, the prevention or redress of wrongs, and the enforcement of contracts, but that no charges or burdens shall be laid upon him which are not equally borne by others; and that in the administration of criminal justice he shall suffer for his offences no greater or different punishment."

In *re Ah Fong,* 3 Sawy. 144, Justice Field held unconstitutional for the same reason, an act passed

by the legislature of California requiring a bond conditioned that Chinese immigrants should not become a charge upon the public.

In *State vs. Montgomery,* 94 Me. 192, the court held unconstitutional an act requiring all peddlers to secure a license, and denying a license to an alien, and in so doing said:

> "Nor can this discrimination be sustained as a constitutional exercise of the police of the state. It must be noted that the discrimination is not against a class, as criminals, as paupers, as intemperates and disqualified by character or habits, or as harmful to society, but as against a class solely as aliens. Such a discrimination is forbidden."

In *Templar vs. Board,* 131 Mich. 254, the court held unconstitutional an act which required barbers to take out a license, but which denied a license to aliens. In its opinion the court said:

> "But had it (the Board) the right to require citizenship? If it had the right to couple that with other requirements, it would have the right to make that the only requirement."

In *re Opinion of Justices* 207 Mass. 601, the legislature submitted to the court the following inquiry:

> "If the legislature is of the opinion that public order, decency, and morality require that girls and young women be excluded from Chinese restaurants and hotels, is it within the

constitutional power of the legislature to enact a law making it a criminal offense for any woman under the age of 21 years to enter a hotel or restaurant conducted by Chinese or to be served with food or drink therein, or for the proprietor of any such hotel or restaurant to admit thereto a woman under the age of 21 years or to serve her with food or drink therein?"

The court quoted from *Powell vs. Pennsylvania,* 127 U. S. 678; *Yick Wo vs. Hopkins,* 118 U. S. 356, and *Barbier vs. Connolly,* 113 U. S. 27, and cited with approval *re Tiburcio Parrott,* 6 Sawy, 349, 1 Fed. 481, and *re Lee Sing,* 45 Fed. 359, and then said:

"The business of keeping a hotel or restaurant to which the proposed legislation relates, is a necessary and proper kind of business that is entitled to the protection of the laws. It may be conducted legally or illegally, by a person of any nationality. The proposed law, without reference to the way in which it is conducted, puts a restraint upon it which might be expected very seriously to interfere with the successful management of it, whenever it is carried on by any person of a particular nationality, which is not put upon it when it is carried on by any person of any other race and nationality. By the strict terms of the proposed law it would be criminal offense for a Chinese proprietor of a hotel or restaurant to permit his wife, if she were under the age of 21 years, or his grown-up daughter of less than that age, to enter his hotel or restaurant, or to be served food or drink therein. This is a very great

interference with the liberty of the subjects of a foreign ruler, lawfully residing within the jurisdiction of this state. It is a harmful discrimination against persons of the prescribed class, founded wholly upon their race and nationality, and it plainly falls within the constitutional prohibition quoted above. It subjects Chinese to an oppressive burden that deprives them of liberty which others enjoy and interferes with their right to carry on business, acquire property and earn a livelihood, and denies them the protection of equal law.

"The only question that can be regarded as doubtful by anybody is that which arises on the supposition that the Legislature may be 'of the opinion that public order, decency and morality require that girls and young women be excluded from Chinese restaurants and hotels.' This brings us to the consideration of the police power. There is no doubt of the right and duty of the Legislature to enact laws for the promotion of public order, decency and morality. But when such legislation interferes with the exercise of personal rights, it must be directed to the prevention of real evils, in the interest of morality. The proposed legislation does not assume to forbid anything that is necessarily evil in itself, or to deal directly with any offense against order, decency or morality. There are good hotels and bad hotels, good restaurants and bad restaurants, kept by men of the Caucasian race, and there are others of both kinds kept by men of other races. The legislation does not refer to the character of the hotel or restaurant that a young woman may not enter, but refers only to the nationality of the person who conducts it. The enactment of such legislation is not a proper exercise of

the police power. It has no direct relation to the evil to be remedied. It forbids the entry of a young woman into the hotel or restaurant of a Chinese proprietor, even if it is a model of orderly and moral management, and it permits the entry of a young women into a hotel or restaurant kept by an American, which it is known to be maintained in part for the promotion of immoral or criminal practices. The classification of hotels and restaurants into those that are open to young women and those that are closed to young women is not founded upon a difference that has any just or proper relation to the professed purpose of the classification. The only classification is into hotels and restaurants kept by Chinese and those kept by persons of other nationality.

"In reference to classifications made in an attempted exercise of the police power, Mr. Justice Brewer said, in *Gulf, Colorado & Santa Fe Railway vs. Ellis,* 165 U. S. 150, 165, 'It is apparent, that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment, and that in all cases it must appear not only that a classification has been made, but also that it is only based upon some reasonable ground—some difference which bears a just and reasonable relation to the attempted classification—and is not a mere arbitrary selection.' See also opinion by Mr. Justice Field in *Ho Ah Kow vs. Hunan,* 5 Sawy. 552, Fed Cas. No. 6, 546.

"The fact that a man is white, or black, or yellow is not a just constitutional ground for making certain conduct a crime in him, when it is treated as permissible and innocent in a person of different color.

"We answer the question in the negative."

The first sentence in the above quotation is the familiar proposition that the keeping of a hotel or restaurant cannot be prohibited under the due process clause of the Fourteenth Amendment. If, however, a legislature has the power asserted in the case at bar, then the opinion of the eminent Justices above quoted, is without foundation, because, to operate a hotel, the proprietor would either have to own or lease the same, and would thereby at least be leasing or using real estate within the meaning of those terms as used in the act in the case at bar. Therefore, the legislature would have had the absolute right to prohibit the ownership, leasing, using or controlling of that real estate, without which the hotel could not be conducted, and having the absolute right thus to prohibit the business *in toto* a partial exercise of less than the whole of an acknowledged power would be valid.

In the case of *Commonwealth vs. Titcomb,* 229 Mass. 14, the court said:

> "It (the legislature) cannot proscribe one class upon the basis of race."

In view of the foregoing authorities, it is submitted that, subject to the exceptions above mentioned, aliens are within the equal protection clause

of the Fourteenth Amendment as fully as citizens, that legislation imposing burdens upon, or limiting rights of, aliens, because of alienage, is void, and that however broad the power of classification may be, classification based upon citizenship as against alienage, or, upon alienage as against citizenship, is void.

The legislature being powerless to discriminate against aliens in favor of citizens and to classify upon the ground of alienage, how can it in reason be said that it may nevertheless discriminate against some aliens in favor of others, or classify aliens among themselves, when all aliens are equally within and protected by the equal protection clause of the Fourteenth Amendment? The Attorney General stoutly argues that it may do so, and that a valid classification has been made by the act in question.

Subdivision (a) of Section 1 of the act subjects to pains and penalties every alien except an alien which the subdivision excludes from the meaning of the word "alien." The language of the subdivision, so far as is pertinent to the case, is as follows:

> "(a) 'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States, but does include all other aliens." * * *

The discrimination in subdivision (a) is therefore founded upon the naturalization laws of the United States. They apply only

> "to aliens being free white persons, and to aliens of African nativity and to persons of African descent."
>
> Revised Statutes, Sec. 2169, Act February 18, 185 (18 Stat. 316).

Subdivision (a), if read as the legislature intended in law it should read, and if by incorporating into it the naturalization law, would read as follows:

> "'Alien' does not include an alien who has in good faith declared his intention to become a citizen of the United States, if such alien be a free white person, or of African nativity or African descent, but does include all other aliens."

This conclusively follows, because, as the courts have held, a Japanese is not a white person or a person of African descent, and cannot therefore be naturalized.

In *re Satio,* 62 Fed. 126.

In *re Young,* 189 Fed. 175.

In *re Geronimo Para,* 269 Fed. 643.

The court, in the instant case, so holds. (Record, p. 14.)

Not being subject to naturalization, a Japanese

could not in good faith declare his intention to become a citizen of the United States. The lower court so held, saying:

> "Nakatsuka not being eligible to citizenship under the law as it now stands, even if such complainant had filed, or sought to file a declaration to become a citizen, he could not—considering the present uniformity in the decisions—fairly be said to have done so 'in good faith'." (Record, p. 14.)

Hence, the Attorney General asserts this proposition: Discriminatory legislation may be enacted by Congress because the constitution contains no equal protection clause operative in Congess, and, due to that fact, the natualization act is valid even though it discriminates against the aliens not included within it, and (if the power of naturalization were not granted to Congress) although that act, if passed by the state, would be in contravention of the equal protection clause of the Fourteenth Amendment, the state may nevertheless make that discriminatory act the basis of its classification in the act in question, merely because the naturalization act was passed by Congress and not by the state. This proposition resolves itself into the further proposition, that, on those matters on which both Congress and the legislatures may act, if Congress, not bound by an equal protection clause, passes an

act, any state legislature, although it is bound by the equal protection clause, may enact precisely the same measure, despite the fact that the statement of the proposition is its own answer. But if it be not, it is fundamental that what cannot be directly done cannot be done by indirection.

It is, of course, true that Congress may permit all aliens, or any class of aliens, less than all, to be naturalized, for whatever reason may seem to it sufficient or wise, being bound by no constitutional limitation on the subject. In the case of *United States vs. Wong Kim Ark,* 169 U. S. 649, 694, this court said:

> "Whatever considerations, *in the absence of a controlling provision of the Constitution,* might influence the legislative or the executive branch of the government to decline to admit persons of the Chinese race to the status of citizens of the United States, * * ." (Italics ours.)

It must be remembered, further, that in the matter of admitting aliens to naturalization, Congress was dealing with a political subject, and not a property right. The act in question deals not with political rights, but with property rights, because, at common law, and in the State of Washington, prior to the enactment in question, aliens had the absolute right to lease real estate for a

reasonable term, that is a term sufficiently short to have no incident whatever of ownership, direct or indirect.

1 *R. C. L.* p. 823, Sec. 33.

This was the law in the State of Washington from the adoption of the Constitution to the passage of the act in question.

State ex rel Winston vs. Morrison, 18 Wash. 664.

In view of the fact that the naturalization law was passed in the exercise of the unrestrained political right of Congress, and the fact that the act in question attempts to bar the appellants of property rights, and must be found to conform to the requirements of the equal protection clause of the Fourteenth Amendment, it should seem readily apparent that the former act cannot be used as the basis of the classification attempted in the latter.

If, in dealing with subjects which are not matters of property right, the state legislatures are bound to observe the equal protection clause of the Fourteenth Amendment, it would seem obvious that respecting property right similar observance is necessary.

Game and fish are the property of the state, are within the plenary power of legislature, and their

killing or taking may be prohibited to all persons who are not citizens of the state.

McCready vs. Virginia, 94 U. S. 395.
Geer vs. Connecticut, 161 U. S. 519.
Manchester vs. Massachusetts, 139 U. S. 240.
Ex rel Silz vs. Hesterberg, 211 U. S. 31.
Patsone vs. Pennsylvania, 232 U. S. 138.

Therefore, if, with respect to that common property of the state, the legislature may not, consistent with the equal protection clause of the Fourteenth Amendment, prohibit a taking by some aliens while permitting it by others, there can be no escape from the conclusion that the legislature, when dealing not with its own property but with property rights of the inhabitants of the state, cannot discriminate against some aliens in favor of other aliens.

In *re Ah Chong,* 6 Sawy. 45, 2 Fed. 733, Judge Sawyer held in violation of the equal protection clause of the Fourteenth Amendment, and the Treaty with China, a statute of California prohibiting all aliens *incapable of becoming electors of the state* from fishing in the waters of the state. In his opinion, that eminent Justice said:

> "Citizens of other states having no property right which entitles them to fish against the will of the state *a fortiori,* the alien, from whatever country he may come has none whatever in

the waters or the fisheries of the state. Like other privileges he enjoys as an alien by permission of the state, he can only enjoy so much as the state vouchafes to yield to him as a special privilege. To him it is not a property right, but, in the strictest sense, a privilege or favor. To exclude the Chinaman from fishing in the waters of the state, therefore, while the Germans, Italians, Englishmen, and Irishmen, who otherwise stand upon the same footing, are permitted to fish *ad libitum* without price, charge, let or hinderance, is to prevent him from enjoying the same privileges as are 'enjoyed by the citizens or subjects of the most favored nations,' and to punish him criminally for fishing in the waters of the state, while all aliens of the Caucasian race are permitted to fish freely in the same waters with impunity and without restraint, and exempt from all punishments, is to exclude him from enjoying the same immunities and exemptions 'as are enjoyed by the citizens or subjects of the most favored nation.' And such discriminations are in violation of Articles V and VI of the Treaty with China cited in full in Parrott's case. The same privileges which are granted to other aliens, by treaty or otherwise, are secured to the Chinaman by the stipulations of the treaty. Conceding that the state may exclude all aliens from fishing in its waters, yet if it permits one class to enjoy the privileges it must permit all others to enjoy upon like terms, the same privileges, whose governments have treaties securing to them the enjoyment of all privileges granted to the most favored nation.

"The fourteenth amendment of the national constitution provides that 'no state shall * * * deny to *any person* within its jurisdiction the

equal protection of the laws." To subject the Chinese to imprisonment for fishing in the waters of the state, while aliens of all European nations under the same circumstances are exempt from any punishment whatever, is to subject the Chinese to other and entirely different punishments, pains, and penalties than those to which others are subjected and it is to deny to them the equal protection of the laws, contrary to those provisions of the constitution."

The foregoing case has been cited with approval in the following cases:

County of San Mateo vs. Southern Pacific Ry. Co., 15 Fed. 722.

United States vs. Balsara, 180 Fed. 694.

Re Takai Maru, 190 Fed. 45.

Raich vs. Truax, 219 Fed. 273.

Tragesser vs. Gray, 73 Md. 251.

Commonwealth vs. Cosick, 36 Pa. County Court Reports, 637.

Harper vs. Galloway, 59 Fla. 255.

It was also cited, but not applied, in *Commonwealth vs. Hanna,* 195 Mass. 262, in which it was held that a statute providing that a license as a hawker and peddlers should be granted only to a person who was or has declared his intention to become a citizen of the United States, on the ground that such occupation was a *privilege* and not a property right.

Believing, as we do, that the legislature can no more impose disabilities upon some, but not all, aliens, than it can upon some, but not all, citizens, we call attention to similar cases respecting discriminations against citizens in the taking of game and fish.

In the case of *Harper vs. Galloway,* 58 Fla. 255, the court held in violation of the equal protection clause an act of Florida requiring residents of the state who were not residents of Marion County therein to give notice of an intention to hunt, and the payment of a special license tax for the privilege of hunting in Marion County, but requiring no notice or license tax from residents of Marion County, and in so doing said:

> "The unjust discrimination against residents of other counties in the state who have rights as to the game in the state as imposed by Section 8 of the Act, is in effect a denial to the residents of the state who are not residents of Marion County, the equal protection of the laws of the land and such Section 8 is inoperative as to residents of this state."

In the case of *State vs. Savage,* 96 Ore. 53, the Supreme Court of Oregon held two acts of the legislature of that state, prohibiting the taking of salt water crabs from Coos County for the purpose of sale, and making it inapplicable to those engaged

in the canning business, to be discriminatory class legislation and void under Article I, Section 20, of the State Constitution, reading as follows:

> "No law shall be passed granting to any citizen or class of citizens, privileges or immunities, which, upon the same terms, shall not equally belong to all citizens."

In its opinion the court said:

> "No good reason is suggested or can be conceived that in the protection of fish a portion of the people should be subject to prosecution and punishment for the catching or transportation for mercantile purposes of salt-water crabs taken in Coos County, while another class of persons operating canneries should have the exclusive right of taking and shipping the same kind of fish beyond the limits of the country for the purposes of sale. The act of 1915 and that of 1917 clearly grants a special privilege or monopoly to those engaged in the cannery business without any good reason therefor, and is discriminatory class legislation and repugnant to article I, sec. 20, of the Constitution and void."

In *Poon vs. Miller* (Tex.), 234 S. W. 573, the court held invalid an act to secure a license to engage in the business of selling at wholesale fish and oysters, and providing that no person could procure such license without swearing that he was a citizen of the United States or a naturalized alien. The action was by a Chinaman to enforce a provision in a contract made with him by the defendants to

the effect that they would not engage in the fish and poultry business within certain territory for a certain time. One defense set up was that the plaintiff could not prevail because he had not secured and could not secure a license under the act in question. The court held against the defendants and said:

> "The state may have the power to regulate the sale of property belonging to the citizen or resident which has become a part of the commerce of the country, but cannot absolutely prohibit such sale in the face of the Federal Constitution, by an alien who has the same rights guaranteed to him as has the citizen.
> * * * *
>
> "We conclude that the provision of the statute denying this right to an alien to whom has been given all the rights of citizens of the most favored countries is in conflict with the treaty between the United States and China, and also is obnoxious to the provisions of the Fourteenth Amendment to the Constitution, and is of no force and effect."

Although there does not appear a direct statement that the Chinese whose rights were infringed by the ordinance involved in *Yick Wo vs. Hopkins*, 118 U. S. 356, were all engaged in the hand laundry business as distinguished from steam laundry business, the opinion clearly indicates that to be the fact, and we submit that this court will take judicial notice of that notorious fact. In that case this

court held invalid a discrimination against Chinese, although there can be no doubt that the state may prohibit the hand laundry business, because in *Quong Wing vs. Kirkendall,* 223 U. S. 59, 83, this Court upheld an act requiring the payment of a license to do hand laundry work but none for the operation of a steam laundry. There Mr. Justice Holmes speaking for the court said:

> "If the state sees fit to encourage steam laundries and discourage hand laundries, that is its own affair."

From the foregoing it follows that even though the prohibition is with respect to a business which can be prohibited to aliens and citizens alike, a prohibition with respect thereto against aliens alone, or some aliens, is invalid, as in controvention of the equal protection clause.

An act, similar in many respects to the act in this case, submitted by the initiative and adopted by the electors of California in November, 1920, contains a provision, as does the act in question, prohibiting the proscribed aliens from being appointed guardian of the estate of a minor when the estate consists, even in part, of real estate. That portion of the California act came before the Supreme Court of California in the case entitled *In the Matter of the Estate and Guardianship of Tet-*

subumi Yano, decided May 1, 1922 (not yet officially reported), in which it appeared that the minor was an American citizen, born in California of Japanese parents, who were aliens; that the alien father, resident of California, applied for guardianship of the said minor and that his application was refused by the lower court because of said act. On appeal the Supreme Court held the provision in violation of the equal protection clause of the Fourteenth Amendment, and in the course of its opinion said:

> "Our law provides that the father or mother of a minor child less than fourteen years of age, if competent, is entitled to be appointed guardian of such child in preference to any other person. (Code Civ. Proc. Sec. 1751.) This law is general in terms. It is not confined to citizens in its application, but purports to confer the right upon all residents regardless of citizenship. The initiatory act of 1920 (Stats. lxxxiii, sec. 4), by its terms, forbids the appointment of an alien not eligible to citizenship as guardian of a minor with respect to property of the minor of a character which such alien cannot acquire for himself, that is to say, with respect to agricultural land belonging to such minor. Its effect is that a citizen of Japan who is the parent of a native born child cannot be appointed guardian of the property of the child where that property consists entirely of agricultural land. This restriction is not put upon a citizen of any country whose citizens are eligible to citizenship here, nor upon any other class of residents of this state who are not citizens thereof. It is clearly a discrim-

ination against citizens of Japan residing in this state.

"Section I of Article XIV of the Constitution of the United States declares that no state shall 'deny to any person within its jurisdiction the equal protection of the laws.' We had occasion to consider this language in *ex parte Kotta,* decided on September 12, 1921 (200 Pac. 957). We there said that 'the word (person) as used in this amendment includes aliens,' and quoting from *Yick Wo vs. Hopkins,* 118 U. S. 396, that it applies 'without regard to any difference of race, of color, or of nationality,' and that the guarantee of 'the equal protection of the laws is a pledge of the protection of equal laws.' These statements are quoted and approved by the Supreme Court of the United States in *Truax vs. Raich,* 239 U. S. 33. In *Barbier vs. Connolly,* 113 U. S. 31, the court declared that this guarantee means that 'equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights.' It needs no argument to demonstrate the proposition that a law which gives to one person the right or privilege of becoming the guardian of his child and withholds it from another, both being alike competent in all respects, is not equal as between the two persons. The person from whom it is withheld is not in such a case accorded the equal protection of the laws. In this respect the initiative act of 1920 is clearly a violation by this state of the guarantee contained in the Fourteenth Amendment, that no state shall deny to any person the equal protection of the laws.

"It cannot be successfully contended that the law may be declared valid in this respect

on the ground that persons who are ineligible to citizenship under the laws of the United States form, by reason of that fact alone, a class by themselves, for which the state may enact peculiar legislation depriving them of rights and privileges which are accorded to others not of that class. The rule in regard to classification, peculiarly applicable to such an attempt, is that the classification 'must be founded upon differences which are either defined by the constitution or natural, and which will suggest a reason which might rationally be held to justify the diversity in the legislation. It must not be arbitrary, for the mere purpose of classification, that legislation really local or *special* may seem to be general, but for the purpose of meeting different conditions naturally requiring different legislation.' (Italics ours.) (*Darcy vs. Mayor, etc.*, 104 Cal. 645.) A law 'makes an improper discrimination if it confers particular privileges or imposes peculiar restrictions or disabilities upon a class of persons arbitrarily selected from a larger number of persons, all of whom stand in the same relation to the privileges granted or burdens imposed, and between whom and the persons not so favored or burdened no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the other from such privileges or burdens. The difference on which the classification is based must be such as, in some reasonable degree, will account for or justify the peculiar legislation.' (*Ex parte Miller*, 162 Cal. 698.) 'While reasonable classification is permitted, without doing violence to the equal protection of the laws, such classification must be based upon some real and substantial distinction, having a reasonable and just relation to

the things in respect to which such classification is imposed; and classification cannot be arbitrarily made without any substantial basis. Arbitrary selection, it has been said, cannot be justified by calling it classification.' (*Southern R. Co. vs. Greene,* 216 U. S. 417.) The right or privilege of a father to be the guardian of his own minor child does not in any respect depend upon or arise out of his nationality or his eligibility to citizenship in this country. It has no relation thereto. Such privilege is no doubt as much prized by a Japanese resident of good character who is not a citizen of this country and cannot become such, as by any other father of like character who is a citizen or eligible to become one. A law denying the privilege to one class and giving it to the other cannot be said to be a law justified by a classification based on a distinction which calls for such peculiar legislation. Such attempted classification does not relieve the act from the charge that it violates the Fourteenth Amendment."

The court further held that the provision violated Section 21 of Article I of the state constitution, which declares that no citizen or class of citizens shall "be granted privileges or immunities which, upon the same terms, shall not be granted to all citizen."

If the naturalization act had furnished a valid basis of classification by a legislature limited by the equal protection clause, that fact would have resulted in the provision being upheld. Hence, that decision is directly in point and is, in effect that a

state legislature cannot use the naturalization act as a basis of classification of aliens. It must follow that the classification attempted in the act in question in the case at bar must find support, if any it has, not in, but aside from the naturalization act. Hence we proceed to an examination of the act.

In its decision of the case arising out of the California alien land act, *Porterfield vs. Webb,* 279 Fed. 114, that court attempted to answer the question in this manner:

> "It is true that Congress has the power arbitrarily to say who may be naturalized and that exercising such power, it has limited the right of naturalization to 'aliens being free white persons, and to aliens of African nativity, and to persons of African descent.' This limitation excludes three of the five great races of the world, the yellow, the brown and the red. And while such exclusion is in a sense arbitrary, it is not without foundation in reason, and has been in effect, except for a brief period, practically during the existence of our government. In any event, once established, *however arbitrary,* and so long as it continues, it furnishes a fundamental and important distinction, which may well be adopted by a state in determining who may not own land within its borders. That fact was clearly recognized by the court and given expression in the Terrace Case in the following language:
>
> " 'It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the wel-

> fare of, the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries. If one incapable of citizenship may lease or own real estate, it is within the realm of possibility that every foot of land within the state might pass to the ownership or possession of non-citizens. Such a result would leave the foundation of the state but a pale shadow, and the structure erected thereon but a tower of Babel, from which the tenants in possession might, when the shock of war came, bow themselves out, because they were not bound as citizens to defend the house in which they lodged'."

There are a number of answers to that argument: First, if every foot of land within the State of Washington should pass into the ownership or possession of aliens, then little could be said in defense of the act as an expression of representative government. Second, the presumptions which are permissible to the legislature, when enacting a rule of conduct, do not include such a theoretical possibility as to be a practical impossibility. Third, the act of government forcing on a resident within its jurisdiction of a condition which causes him to lack an interest in and power to effectually work for the welfare of the state, and then classifying him on the ground of the necessary result of that condition forced on him, against his will, does not square with the doctrine of American fair play.

Fourth, the statement of the court that a difference, however arbitrary, might be availed of as a ground of classification by a state bound by the equal protection clause of the Fourteenth Amendment is directly contrary to every decision of this court on that point. Fifth, Congress, in passing the naturalization act, was not limited by an equal protection clause, but the state, when passing the act in queston, was, and what cannot be done directly cannot be done indirectly. It is submitted that the queston is not disposed of by the foregoing quotations.

Again, it is to be remembered that the substance of an act of the legislature cannot be concealed by its form. This court, when determining the constitutionality of acts of the state legislatures, has so frequently said that the substance, not the form, of an act must be regarded, as to make a citation of authority to that effect unnecessary. In no instance has the substance of an act been more carefully concealed by its form. This act is nothing more nor less than a legislative declaration that only free white persons, and persons of African natvity, and persons of African descent, may lease, control, use, enjoy, etc., lands within the State of Washington. This is so obvious that the point requres no further argument, nor is it necessary to

cite authority to the effect that the act when so regarded, is in violation of the equal protection clause.

It will be observed that an alien as defined by the act excludes an alien who has declared his intention in good faith to become a citizen of the United States. Such a declaration does not make him any the less an alien in fact, since he remains an alien until he is admitted to citzenship by a decree of one of the prescribed courts. Hence, for the purpose of the act, some aliens are *not* aliens, but other aliens *are* aliens. By the express terms of the act of June 25, 1910, Chapter 401, Section 3, an alien who has so declared his intention may, not less than two years nor more than seven years thereafter, file his petition for citizenship, without which he cannot be admitted to citizenship, By the terms of Section 6 of the Washington Statute, upon failure to secure admission to citzenship within seven years after the filing of the declaration of intention "it shall be presumed that he declares his intention in bad faith." Hence an alien can declare his intention and thereby become eligible to all the rights of a citizen with respect to real estate, in entire compliance with the act, while the prescribed alien, who is in fact no more an alien than the former, is at all times not only barred from similar

rights, but is absolutely barred from declaring his intention to become a citizen of the United States. The said alien who has so declared his intention can fail to apply for citizenship and does not lose his rights, under the act in question, because his failure to file his petition creates only a presumption that his declaration was not in good faith. Hence, he can remain an alien for fourteen years, and still enjoy all the rights of a citizen with respect to real estate, while the other alien can at no time acquire any right whatever according to the terms of the act. The only difference between the alien who has so filed his declaration, under the foregoing, and an alien of the proscribed class, is that the former filed a declaration of intention from which nothing whatever resulted, while the latter has not at any time been permitted to file his declaration of intention. Yet the one is an alien, by the terms of the act, and the other is not an alien, although, in fact, he is an alien to the same extent that he was prior to the filing of his declaration of intention. Classification cannot change facts; such an arbitrary classification is utterly void.

In its opinion, the lower court said, (Record p. 21):

"It is obvious that the objection on the part

of Congress is not due to color, as color, but only to color as an evidence of a type of civilization which it characterizes. The yellow or brown racial color is the hallmark of the Oriental despotisms, or was at the time the original naturalization law was enacted. It was deemed that the subjects of those despotisms, with their fixed and ingrained pride in the type of their civilization, which works for its welfare by subordinating the individual to the personal authority of the sovereign, as the embodiment of the state, were not fitted and suited to make for the success of a republican form of government. Hence they were denied citizenship. * * * *

"It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries."

The foregoing quotation suggests the only basis upon which a classification might be made. If under any circumstances the legislature may classify aliens, with respect to the subject matter of the act in question, the classifiication must be founded upon adherence and attachment to, respect for and interest in American Government and its institutions, because, obviously, that is the only *legitimate* end of government for the accomplishment of which the act might in any event be passed.

In the exercise of the police power, the statute must have some fair tendency to accomplish, or

must aid in the accomplishment of, some purpose for which the legislature may use the power, and if the means employed have no real, substantial relation to a public object which government can accomplish, the courts will declare the statute invalid, (*Welch vs. Swasey,* 214 U. S. 191, 195), and classification must be reasonable, not arbitrary, and the equal protection clause requires that the classification shall be upon distinctions having a fair and substantial relation to the object sought to be accomplished by the legislation, (*Atchinson, Topeka & Santa Fe Railway Co. vs. Vosberg,* 238 U. S. 56, 59), and must be founded upon a distinction bearing a reasonable and just relation to the things in respect to which such classification is imposed, (*Southern Ry. Co. vs. Green,* 216 U. S. 400).

As above suggested, the only legitimate end to be accomplished by the act in question is insuring that the rights in or to real estate mentioned in the act shall be exercised only by those persons who adhere and are attached to and who respect the American Government and its institutions. Hence, it remains only to be seen whether the act really and substantially accomplishes that purpose, and whether the means adopted do, in fact, reasonably result in the determination of that ultimate fact,

which must be the basis of the classification attempted. Aliens of the proscribed class, resident in the state, may have the same adherence and attachment to and respect for the American Government and its institutions as the most patriotic citizen in the state, but they are nevertheless proscribed by the act. No means are afforded by which the ultimate fact, which is the legitimate end of such legislation, can be determined, and the question is forever foreclosed by the act, irrespective of the fact. A question, similar in principle, was before this court in the case of *Smith vs. Texas,* 233 U. S. 630, in which case this court held in violation of the equal protection clause an act which made it a misdemeanor for any person to act as a conductor on a railway train without having previously served for two years as a freight conductor or brakeman. In its opinion the court held:

> "The statute here under consideration permits those who had been freight conductors for two years before the law was passed, and those who for two years have been frieght conductors in other states, to act in the same capacity in the state of Texas. But barring these exceptional cases, the act permits brakemen on freight trains to be promoted to the position of conductor on a freight train, but excludes all other citizens of the United States from the right to engage in such service. The statute does not require the brakeman to prove his fitness, though it does prevent all others from

showing that they are competent. The act prescribes no other qualification for appointment as conductor than that for two years the applicant should have been a brakeman on a freight train, but affords no opportunity to any others to prove their fitness. It thus absolutely excludes the whole body of the public, including many railroad men, from the right to secure employment as conductor on a freight train.

"Or it is to be noted that under this statute, not only the general public, but also four classes of railroad men, familiar with the movement and operation of trains, and having the same kind of experience as a brakeman, are given no chance to show their competency, but are arbitrarily denied the right to act as conductors. The statute excludes firemen and engineers of all trains, and all brakemen and conductors of passenger trains. But no reason is suggested why a brakeman on a passenger train should be denied the right to serve in a position that the brakeman on a freight train is permitted to fill. Both have the same class of work to do, both acquire the same familiarity with rules, signals, and methods of moving the distributing cars, and if the training of one qualifies him to serve as conductor, the like training of the other should not exclude him from the right to earn his living in the same occupation."

The lower court said that the proscribed races were the "Hallmark" of despotism, and that it was that fact to which the legislature objected. History recounts no instance of the despotism approaching that which has always prevailed in Russia, or of that which has always prevailed in Turkey, nor of

the bloody barbarity which has systematically been practiced in Turkey upon the subjects of that government. Yet the Russian and the Turk are admitted to citizenship in the United States, and may have all the rights of citizens of the state with respect to lands within the state. It is a matter of history and common knowledge that those individuals, in the United States, who habitually spend their time and effort in plotting the forcible overthrow of this government are notably from Russia. These being the facts, it cannot be said that the subjects of Russia and Turkey are attached to or respect the American Government or its institutions. It cannot be said that the admission to citizenship of the Zulu, the Kaffir, and cannibal tribes of the Congo and the tribes of Ashantee and Dahomey, all admissible to citizenship in the United States, and hence to the rights of citizens of the state with respect to lands, contribute to the preservation of our form of government and our civilization and its enrichment or the making of our form of government a success by taking in the refinements, social gifts and graces and the firm attachment to republican institutions that have so long made these races an example to Americans. China has been a republic for some years and has been recognized as such by our government, but the Chinese cannot be ad-

mitted to citizenship in the United States, and hence are denied the right of other aliens to lands in the State of Washington. Japan stands among the foremost nations today, not only in civilization, accomplishment, civic pride, but in all those national attributes which make her one of the great recognized powers. Her nationals, resident in America, are notably law-abiding and industrious, and actuated by civic pride to such a degree as stands as an example to American citizens. Many of them have been residents of the state for years, have made it their permanent homes, but despite these facts it is suggested that they are not attached to this government. Do men voluntarily emigrate to live and raise their children in a country and under a government to which they are not attached and whose institutions they do not respect? Common sense and observation dictate a negative answer.

When an act, which concededly must have a substantial relation to the determination of the existence or absence of adherence and attachment to and respect for American institutions and the American government, so utterly fails to accomplish that purpose how can it be said that it is other than an arbitrary fiat formulated in utter disregard of the facts? As we have seen, a resident alien may

have the same requisites and necessary qualities for citizenship as has the most patriotic, but if he is in the proscribed class the fact is utterly immaterial. Likewise, the classification permits the exercise of rights by and extends privileges to aliens from other countries whose history is utterly subversive of all principles on which the American Government is founded, and whose nationals here have been notably connected with plots for the forcible overthrow of this government. The act, however, permits the latter class to exercise all of the rights of citizens with respect to land. From whatever point of view the act be considered, it is plainly apparent that the classification utterly fails of the purpose of valid classifiication and that the act is no more than an arbitrary and capricious fiat.

The vice of this act is that it makes a class within a class. The effect following that fact is nowhere better stated than in *State vs. Julow,* 129 Mo. 163, where the court had under consideration and held void a statute of Missouri, making it an offense to discharge a laborer because of membership in a labor union, to which doctrine this court stands firmly committee (*Adair vs. United States,* 208 U. S. 161; *Coppage vs. Kansas,* 236 U. S. 1), and in the course of its opinion the court said:

"But the statute is obnoxious to criticism on other grounds. It does not relate to persons or things as a class—to all workingmen, etc.—but only to those who belong to some 'lawful organization or society,' evidently referring to a trade union, labor union, etc. Where a statute does this—where it does not relate to person or things as a class, but to particular persons or things of a class—it is a special, as contradistinguished from a general, law. *State vs. Tolle*, 71 Mo. 645; *State vs. Herrimann*, 75 Mo. 340. Here a non-trade-union man or non-labor-union man could be discharged without ceremony, without let or hindrance, whenever the employer so desires, with or without reason, while, in the case of a trade union or labor union man, he could not be discharged, if such discharge rested on the ground of his being a member of such an organization. In other words, the legislature have undertaken to limit the power of the owner or employer as to his right to contract with or to terminate a contract with particular persons of a class and therefore the statute which does this is a special, not a general law, therefore violative of the constitution. Judge Cooley says: 'A statute would not be constitutional which would select particular individuals from a class or locality and subject them to particular rules, or impose upon them special obligations or burdens, from which others in the same class or locality are exempt. Every one has a right to demand that he be governed by general rules, and a special statute which, without his consent, singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but would be such an arbitrary mandate as is not within the providence of free government.' *Cooley Const. Lim.*

391. The legislature may legislate in regard to a class of persons, but they cannot take what may be termed a natural class of persons, split that class in two, and then arbitrarily designate the dissevered fractions of the original unit as two classes, and enact different rules for the government of each. This would be a mere arbitrary classifiication, without any basis of reason on which to rest, and would resemble a classification of men by the color of their hair, or other individual peculiarities, something not competent for the legislature to do. *State vs. Herrmann,* 75 Mo. loc. cit. 353."

The same principle was applied in *Connolly vs. Union Sewer Pipe Co.,* 184 U. S. 540, in which this court held invalid an Illinois statute, exempting agriculturists and livestock dealers from its provisions, and which prohibited combinations in restraint of trade, saying:

"We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the state for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill, or acts to destroy competition and to control prices for their special benefit is too manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary."

The same principle was applied in *Gulf, Colorado & Santa Fe Ry. Co. vs. Ellis,* 165 U. S. 150. The principle was again applied in *Cotting vs. Kansas City Stockyards,* 183 U. S. 79, in which this court held in violation of the equal protection clause an act of Kansas which limited the amount of the charges to be made by a stockyard company, without limiting the charges to be made by similar corporations doing a smaller amount of business, and without any reference to the character or value of the services rendered, although the statute was general in its terms and applicable to any corporation doing business of a certain amount, and notwithstanding the fact that by virtue of the great amount of business done by the corporation affected by the statute it might make a reasonable income, since the statute made a positive and direct discrimination between persons engaged in the same class of business, and based it simply upon the quantity of business which each might do. In its opinion this court said:

> "This statute is not simply legislation which in its indirect results affects different individuals or corporations differently nor with those in which a classification *is based upon inherent differences in the character of the business,* but is a positive and direct discrimination between persons engaged in the same class of business, and based simply upon the

quantity of business which each may do." (Italics ours.)

In the case of *McFarland vs. American Sugar Refining Company,* 241 U. S. 79, this court held in violation of the equal protection clause an act of Louisiana defining the business of sugar refining as that of "any concern that buys and refines raw or other sugar exclusively, or that refines raw or other sugar from sugar taken on toll, or that buys or refines more raw or other sugar than the aggregate of the sugar produced by it from cane grown and purchased by it." and created a presumption of participation by a sugar refiner in a forbidden monopoly or combination from the systematic payment in Louisiana by a person or company engaged in sugar refining within that state of a less price for sugar than he paid in any other state, and that the closing or keeping idle of a sugar refinery for more than one year was for the purpose of violating that statute against monopolies, and provided criminal penalties therefor. Answering an argument to sustain the classification, this court said:

> "As to the classification, if a powerful rival of the plaintiff should do no refining within the state, it might systematically pay a less price for sugar in Louisiana than it paid elsewhere with none of the consequences attached to doing so in the plaintiff's case. So of anyone who purchases but does not refine. So of

> any concern that does not buy and refine more sugar 'than the aggregate of the sugar produced by it from cane grown and purchased by it,' as easily might happen with a combination of planters, such as the answer gives us to understand has been attempted heretofore."

The foregoing cases illustrate the rule that a valid classification must have a reasonable relation to a legitimate end of government, and that a classification which has no tendency to the accomplishment of that purpose is void. The vice of the classification attempted in the instant case, because of that lack of reasonable relation to the legitimate purpose of government, is illustrated by the decision in *Atchinson, Topeka & Santa Fe Ry. Co. vs. Vosberg (supra),* 238 U. S. 56, in which the reciprocal demurrage law of Kansas was sought to be upheld on the argument that the classification had a reasonable relation to the object of securing adequate car service. The contention was summarily disposed of thus: -

> "In short, it is erroneous to test the classification by its supposed relation to the object of securing adequate car service, because it really relates to the object of securing adequate prosecution in court of actions respecting car service."

So in the case at bar, the act must be tested by its supposed relation to making certain that

the right involved may be exercised only by those who adhere and are attached to and respect this government and not by reason of alienage, or those things which are necessarily inherent in aliens because of alienage.

In the case of *Truax vs. Raich (supra),* 239 U. S. 239, (in which the facts are too well known to require their statement), Mr. Justice Hughes, speaking for the court said:

> "The discrimination against aliens in the wide range of employment to which the act relates *is made an end in itself,* and thus the authority to deny to aliens, *upon the mere fact of their alienage,* the right to obtain support in the ordinary fields of labor, is necessarily involved. It must also be said that reasonable classification implies *action consistent with the legitimate interests of the state."* * * *

Equally in this case as in that, the classification is based wholly upon alienage and the discrimination against the proscribed aliens is likewise made an end in itself, and the classification is not consistent with the legitimate interests of the state, because the means adopted have no reasonable tendency to the accomplishment of the ultimate legitimate object of the state. In *Truax vs. Corrigan* (decided December 19, 1921), Chief Justice Taft, speaking for the court concerning classification, said:

"It must therefore obtain in and determine legislation; but it must regard real resemblances and real differences between things, and persons, and class them in accordance with their pertinence to the purpose in hand."

White men, black men, red men and brown men are, by reason of that fact very different, and there is a vast difference between a man of wealth and a poverty-stricken man as universal everyday experience most forcibly teaches, but a rule of conduct based upon such differences would be clearly invalid. In the case of *Gulf C. & St. R. Co. vs. Ellis,* 165 U. S. 150, Mr. Justice Brewer said:

"The state may not say that all white men shall be subjected to the payment of the attorneys' fees of parties successfully suing them, and all black men not. It may not say that all men beyond a certain age shall be alone thus subjected, or all men possessed of a certain wealth. These are distinctions which do not furnish any proper basis for the attempted classifiication."

In the case of *Tanner vs. Little,* 240 U. S. 369, Mr. Justice McKenna said:

"Classification is not different in law than in other departments of knowledge. 'It is the grouping of things in speculation or practice because they agree with one another in certain particulars and differ from other things in those particulars.' *Billings vs. Illinois,* 188 U. S. 97, 102, 47 L. ed. 400, 403, 23 Sup. Ct. Rep. 272. Upon what differences or resemblances it may

be exercised *depends necessarily upon the object in view,* may be narrow or wide according to that object. Red things may be associated by reason of their redness, with disregard of all other resemblances or of distinctions. Such classification would be logically appropriate. Apply it further; make a rule of conduct depend upon it, and distinguish in legislation between red-haired men and black-haired men and the classification would immediately be seen to be wrong; it would have only arbitrary relation to the purpose and province of legislation. The power of legislation over the subject-matter is hence to be considered." (Italics ours.)

The foregoing cases clearly demonstrate the rule that classification must be based on real resemblances or real differences having a reasonable relation to a legislative object.

Where is the difference between Japanese, on the one hand, and Russians, Turks, Zulus, Kaffirs, Hatians and the cannibal tribes of the Congo on the other so far as concerns the distinction made between them by this act as a determination of the ultimate, legitimate legislative purpose to insure the rights respecting real estate being exercised only by those who are attached and adhere to and respect the American government and its institutions? And if such a difference exists, can this court judicially say that the difference is not in

favor of the Japanese? Can this court solemnly adjudge that the two respective classes of aliens so resemble their co-aliens, and that between the two classes of aliens there exist such real differences that they may validly be so classed "in accordance with their pertinence to the purpose in hand?"

Aliens cannot be classified on the ground of alienage. Of course, it is fundamental that, the legislature being powerless so to do, it cannot by indirection accomplish the same result by classifying on that which of necessity, by reason of alienage, inheres in the alien. In its opinion (Record p. 21) the lower court said:

> "It is obvious that one who is not a citizen and cannot become one lacks an interest in, and the power to effectually work for the welfare of the state, and, so lacking, the state may rightfully deny him the right to own and lease real estate within its boundaries."

The proposition stated by the court may be put in plainer terms, thus: Government, by its legislative action, may force a condition upon its unwilling subjects, and, having done so, may classify subjects on the basis of the conditions so forced on them. If, as stated by the lower court, it is obvious that Japanese lack an interest in and the power to effectually work for the welfare of the state by reason of the naturalization act, it does

not square with the requirements of a constitutional government to classify them by reason of the conditions thus forced upon them against their will. This is not the fair play demanded by American institutions.

In *State ex rel. Constantini vs. Darwin,* as State Fish Commissioner, 102 Wash. 402, an application for a writ of mandamus was made to compel the defendant to issue a fishing license for the year 1918. The relator was an Austrian, resident in the state since 1913, in which year he declared his intention to become a citizen of the United States. His application for such license had been denied by the Fish Commissioner, because of section 5150-43 of Remington's Annotated Code, which provides:

> "No license for taking or catching salmon or other food or shell fish required by this act shall be issued to any person who is not citizen of the United States of the age of eighteen years or over, unless such person had declared his intention to become a citizen and is and has been an actual resident of the state for one year immediately preceding the application for such license. * * * "

And also section 4362 of the 1916 Compiled Statutes of the United States, which provides:

> "No alien who is a native citizen or subject, or a denizen of any country, state or sovereignty with which the United States is at war,

at the time of his application, shall be admitted to become a citizen of the United States."

The court held that, despite the fact that the relator could not be admitted to citizenship, he was nevertheless entitled to his license. If the law is that as to a *privilege,* an alien is entitled to the same relief as if he were a citizen, it is apparent that an act which denies a *property right* because of alienage, is not only discrimination for the purpose of discrimination, but is invidious discrimination.

Again, a Japanese born in Africa, of Japanese parents, may in good faith declare his intention to become a citizen, and thus be entitled to the same property rights as citizens. There can be no rational difference between such a Japanese and one born in Japan, but such is the effect of the act, and indeed its plain terms. Such a discrimination is invidious, and cannot be upheld.

As the entire act applies only to the aliens subjected to its provisions and excludes all other aliens from its provisions, by reason of the language in subdivision (a), Section 1, the entire act is invalid.

United States vs. Reese, 92 U. S. 214.
The Trademark cases, 100 U. S. 82.
United States vs. Harris, 106 U. S. 629.

Baldwin vs. Franks, 120 U. S. 678.

James vs. Bowman, 190 U. S. 127.

United States vs. Ju Toy, 198 U. S. 253.

Illinois Central Ry. Co. vs. McKendree, 203 U. S. 514.

Butts vs. Merchants & Miners Transportation Co., 230 U. S. 126.

McFarland vs. American Sugar Refining Co., 241 U. S. 79.

IV.

THE IMPOSSIBILITY OF COMPLIANCE WITH THE ACT UNDER CONSIDERATION BY A JAPANESE, FREES HIM FROM THE OBLIGATION TO COMPLY.

The principle invoked is illustrated in the rules established with respect to conveyances and wills. Where an estate vests, to which is attached the obligation of the performance of a condition subsequent, and such performance becomes impossible without fault on the part of the grantee or devisee, the estate is freed from the condition.

8 *R. C. L.* 1107, Sec. 167.

28*R. C. L.,* p. 320, Sec. 308.

The condition in the act under consideration, requiring a Japanese to declare his intention to become a citizen of the United States, is the requiring of an impossible condition, and, therefore,

the Japanese is by law freed from the obligation to comply.

Endlich on Interpretation of Statutes, Sec. 441.

"A command which cannot be obeyed is not law. Therefore, possible obedience is an inseparable element in every law without which it cannot exist. So that, though a command should be such as could in general, be carried out, if in a particular instance it becomes impossible, it would not be law for that instance."

Bishop's Non-contract Law, Sec. 156.

"Upon another question, also, the authorities agree, namely, that when the law creates a contract or otherwise casts on one a duty, he is excused if the thing becomes, in the absolute sense we are considering, impossible."

Bishop on Contracts, Sec. 595.

The act under consideration, by requiring Japanese, in order to escape its penalties and forfeiture of their estates, to do the impossible, while requiring of all European aliens only compliance with the possible, conflicts with the Fourteenth Amendment to the Constitution of the United States and is void.

In *re Ah Chong,* 2 Fed. 733.

In *re Tiburcio Parrott,* 1 Fed. 481.

V.

THE ACT IS CONTRARY TO ARTICLE I OF THE EXISTING TREATY BETWEEN THE UNITED STATES AND THE EMPIRE OF JAPAN, IN THAT IT PROHIBITS JAPANESE SUBJECTS, RESIDENT IN THE STATE OF WASHINGTON, FROM CARRYING ON THEREIN TRADE, WHOLESALE AND RETAIL, FROM LEASING LAND FOR COMMERCIAL PURPOSES AND FROM DOING THE THINGS NECESSARY OR INCIDENT TO TRADE UPON THE SAME TERMS AS NATIVE CITIZENS OR SUBJECTS.

Violation of the Treaty

The alien Japanese appellant is entitled by the treaty between the United States and Japan, dated February 21, 1911, proclaimed April 5, 1911, United States Statutes at Large, Volume 37, pages 1504-9, to protection against the enforcement of the act of the State of Washington making an invidious discrimination against him and his race because of race, color and place of nativity, not made by the act against other aliens who are "free white persons" or "aliens of African nativity" or "persons of African descent."

It is true that the act does not in words mentions race, color or place of nativity, but the standard prescribed by the act to be complied with in

order to escape the stigma of being "an alien" as defined by the act and the consequent disabilities flowing from such statutory alienage renders it as impossible for Japanese born elsewhere than in Africa to escape such stigma and disability as though the act read, "Alien does not include an alien who has in good faith declared his intention to become a citizen of the United States who is a free white person or an alien of African nativity or a person of African descent, but does include all other aliens."

The act might just as well have been so worded. On its face compliance is optional. As to those of certain races and colors compliance is optional. As to the Japanese, compliance is only not optional but on account of their race, color and place of nativity, is impossible. The question then is whether the treaty between the United States and Japan either in letter or spirit renders invalid the statute of the State of Washington subsequently enacted containing an invidious discrimination against Japanese because of their race, color and place of nativity.

It is not necessary either to assert or establish the proposition that the treaty affirmatively confers upon Japanese the right to acquire or lease prop-

erty in the State of Washington.

It is only necessary to show that the prohibition in the state statute is one which expressly or impliedly violates the letter or spirit of the treaty.

Is it possible to suppose that the Treaty of 1911 would have been entered into by Japan if it had contained a provision that the separate states of the United States should be free to thereafter enact penal laws punishing as a class resident alien Japanese for purchasing or leasing real estate in the state while expressly permitting such purchase or lease by aliens of races, colors and places of nativity other than Japanese?

Interpretation and Consideration of Treaty

The terms of the Treaty of 1894 between the two countries was approaching expiration. The opening sentence of the Treaty of 1911 is significant.

> "The President of the United States of America and His Majesty, the Emperor of Japan, being desirous of strengthening the relations of amity and good understanding which happily exist between the two nations * * * * have resolved to conclude a Treaty of Commerce and Navigation for that purpose."

Nowhere in the treaty is there color for the suggestion that a Japanese alien resident in any state could be subjected to any disability or discrim-

ination to which any other alien would not be subjected. There are only two standards of treatment prescribed:

1. The same treatment "as native citizens or subjects."

2. "Most favored nation treatment in the territories of the other."

The latter standard of treatment governs even the coasting trade, "which is excepted from the provisions of the present treaty" (Article 13).

Is it reasonable then to suppose that where the treaty so carefully protected the citizens and subjects of both the High Contracting Parties by according in certain respects the same treatment as of native citizens and subjects and in certain other respects "most favored nation treatment" it nevertheless did not in spirit and impliedly prohibit the subsequent enactment of a state statute changing the existing law and invidiously discriminating against resident alien Japanese because of their race, color and nativity as compared with other resident aliens of different race, color and place of nativity.

The fact that the control of the emigration of Japanese laborers to the United States was not made a matter of treaty but was left to the honor of the

Empire is sufficient to demonstrate that invidious discrimination against Japanese under state statutes to be enacted in the future were prohibited by a treaty entered into "to strengthen the relations of amity and good understanding which happily exist between the two nations."

Interpretation and Construction of Treaty

Japan, in entering into the treaty was entitled to understand that it prohibited an invidious discrimination against Japanese whereby they were singled out from European and African aliens and subjected to penalties and disabilities to which such other aliens were not subjected when the discrimination was one which the diplomatic history of the United States shows the United States would not have permitted any state or nation to have made against a citizen of the United States.

In March, 1882, the American Legation at Madrid reported overtures by the Liberian Minister, resident at Madrid, looking to a concerted remonstrance of the diplomatic representatives at that capital against a Spanish law or regulation prohibiting the landing of foreign negroes in Cuba unless on the condition of depositing one thousand dollars. The Department of State had never had

a case presented where the rights of an American citizen became involved, but the Department of State advised the legation that if a case should be brought to its notice it would remonstrate against it "as imposing a race discrimination not foreseen by treaty or recognizable under the amended constitution." International Law Digest, Moore, Volume 4, Section 552.

In 1873 a controversy arose between the United States and Russia. A license had been refused to a Jewish American citizen in Russia. The United States took the position that an American citizen could not be discriminated against because of his religious belief. Mr. Fish, Secretary of State, commenting on Mr. Jewell's presentation of the case, remarked that the withholding of the license from Rosenstrauss "on account, as it is understood, of his being a Hebrew of foreign birth," seemed to be in direct violation of the treaty the purpose of which was to place all citizens of the United States in Russia "on the same footing as native Russians." International Law Digest, Moore, Volume 4, Page 113.

It certainly was not within the contemplation of the parties to the treaty of 1911 that Japanese should be put on a lower footing than that of other

aliens resident in the State of Washington.

In 1885 the United States had a controversy with Turkey in reference to a Hebrew American citizen. International Law Digest, Moore, Section 555, states:

> "In an instruction of August 29, 1885, to the American Minister at Constantinople the Department of State observed that the rights of American citizens in Turkey under treaties were to be measured in a certain degree by the rights conceded to other foreigners of the most favored nation and for this reason the Minister was to be 'careful to make no untenable demand *as of right.*' Friendship and comity, however, entitle the United States, said Mr. Bayard, 'to ask and expect that no race or class distinction shall be made as regards American citizens abroad.' "

In 1879 a question arose between the United States and Mexico concerning a law of Mexico of 1863, which provided that natural born and naturalized citizens of nations adjoining the Republic could not acquire public lands in the states bordering such nations. The United States took the position that a citizen of the United States was invidiously discriminated against in contravention of the treaty between the United States and Mexico by the law of 1863.

A communication from the United States to Mexico contains the following language:

"The discrimination in this respect between those citizens and other foreigners is still believed to be invidious, unnecessary, at variance with the treaty, and quite incompatible with those friendly relations which the obvious interest of both countries requires should be maintained between them * * * The Mexican law of 1863 is especially invidious towards citizens of our border states because it practically discriminates against them by name and thereby stigmatizes them as unworthy to have the privilege of holding the real estate. This stigma cannot be acquiesced in by this government which does not admit the right of any foreign power to discriminate between citizens of different states of this Union who can only be known abroad as citizens of the United States. It may be that the treaty of 1831 does not expressly confer upon citizens of the parties the right to hold real estate in their respective territories nor does it provide for an equality of rights in that respect between Mexicans and our own citizens, although the equality between citizens of the United States and other foreigners in Mexico is by the second and third articles of the treaty literally restricted to matters of commerce and navigation. It may also fairly be construed to include a like equality in the privilege of acquiring and holding real estate.

"It cannot be doubted that if the construction now claimed had been anticipated it would have been thwarted by an explicit provision. There is believed to be no such discrimination against Mexican citizens in any law in this country." International Digest, Moore, Volume 6, Page 702.

The Mexican government did not yield to the

protest of the United States. On the other hand the United States did not withdraw its protest. Was the United States acting in good faith in making its protest to Mexico? Certainly no American would for one moment contemplate the thought that the United States was trying to force a weaker power to yield to a view of the law which the United States believed was unfounded. It must be assumed that the United States in good faith believed that the Mexican law constituted an invidious discrimination against a certain class of citizens of the United States. This controversy with Mexico arose long before the United States and Japan entered into the treaty of 1911. Was Japan justified or not in assuming that an invidious discrimination between Japanese and other aliens resident in one of the states of the United States was not forbidden by the treaty, when the United States in its controversy with Mexico had taken the position that a very much less objectionable discrimination had been made by the Mexican law against a certain class of citizens of the United States. Certainly good faith would have required the United States to have notified Japan that it no longer believed that the protest which the United States had made to Mexico was well founded in law. It is certain that had the United States inserted in the treaty with Japan a

provision that Japanese might be discriminated against so that they would not, under the law of certain states of the United States, have the same privileges as aliens of other nationalities, the treaty would not have been entered into by Japan, and it is equally certain that if it had been contemplated by Japan that the treaty as written permitted such discrimination the treaty either would not have been made or else there would have been a provision inserted in its thwarting such interpretation.

After the Treaty of 1911 had been ratified by the respective countries, the President of the United States proclaimed its ratification in the following language:

> "Now, therefore, be it known, that I, William Howard Taft, President of the United States of America, have caused the said treaty as amended and the said understanding to be made public to the end that the same and every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof."

As the opening of the treaty states: It was entered into for the purpose of "strengthening the relations of amity and good understanding which happily existed between the two nations." It is inconceivable that the treaty contemplated the right of a state to enact a law which might cause a breach

of international relations between the two countries when the breach would be brought about by a state of the Union making a discrimination which was more invidious than the discrimination which had been the cause of a protest by the United States to Mexico prior to the enactment of the Treaty of 1911.

How Should a Treaty Be Interpreted or Construed?

"We think, then, that the rights of the parties must be determined by the Treaty but that this particular convention being operative upon both powers and intended for their mutual protection should be interpreted in a spirit of *uberrima fides,* and in a manner to carry out its manifest purposes * * * As treaties are solemn engagements entered into between independent nations for the common advancements of their interests and the interests of civilization, and as their main object is not only to avoid war and secure a lasting and perpetual peace, but to promote a friendly feeling between the people of the two countries they should be interpreted in that broad and liberal spirit which is calculated to make for the existence of a perpetual amity, so far as it can be done, without the sacrifice of individual rights of those principles of personal liberty which lie at the foundation of our jurisprudence."

Tucker vs. Alexandroff, 183 U. S. 424, 437.....

"It is a general principle of construction with respect to treaties that they shall be liberally construed so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construc-

tion words are to be taken in their ordinary meaning as understood in the public law of nations and not in any artificial or special sense impressed upon them by local law unless such restricted sense is clearly intended, and it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred.

Geoffrey vs. Riggs, 133 U. S. 258-271.

"Is it necessary in an enlightening age to say that mental reservations cannot be admitted into treaties? This is manifest since by the very nature of the treaty the parties are bound to express themselves in such a manner that they may mutually understand each other. There is scarcely an individual now to be found who would not be ashamed of building upon mental reservation. What can be the use of such an artifice unless to lull the opposite party into a false security under the vain appearance of a contract?"

Vattel's Law of Nations, p. 284.

Is it for one moment to be supposed that in the Treaty of 1911 the United States expected Japan to understand that it would be permissible for one of the states of the Union to enact a law in the future which would impose upon Japanese subjects resident in such states the disability in purchasing and leasing real estate which was not imposed upon other aliens in the same state? If not, then

the upholding of such a right on the part of the state would be to charge the United States with entertaining the thought of such a mental reservation.

There remains the question of the construction of the terms of the Treaty.

Article I of the said Treaty is as follows:

"The citizens or subjects of each of the High Contracting Parties shall have liberty to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail, to own or lease and occupy houses, manufactories, warehouses and shops, to employ agents of their choice, to lease land for residential and commercial purposes, and generally to do anything incident to or necessary for trade upon the same terms as native citizens or subjects, submitting themselves to the laws and regulations there established.

They shall not be compelled, under any pretext whatever, to pay any charges or taxes other or higher than those that are or may be paid by native citizens or subjects.

The citizens or subjects of each of the High Contracting Parties shall receive, in the territories of the other, the most constant protection and security for their persons and property, and shall enjoy in this respect the same rights and privileges as are or may be granted to native citizens or subjects, on their submitting themselves to the conditions imposed upon the native citizens or subjects.

They shall, however, be exempt in the territories of the other from compulsory military service either on land or sea, in the regular

forces, or in the national guard, or in the militia; from all contributions imposed in lieu of personal service, and from all forced loans or military exactions or contributions."

Where a treaty admits of two constructions, one restrictive of rights which may be claimed under it, and the other liberal, the latter is to be preferred.

Shanks vs. Dupont, 3 Pet. 242.

United States vs. Reynes, 9 How. 126.

Hauenstein vs. Lynham, 100 U. S. 473.

Chew Hoeng vs. United States, 112 U. S. 536.

Geoffrey vs. Riggs, 133 U. S. 258.

United States vs. Texas, 162 U. S. 1.

Tucker vs. Alexandroff, 183 U. S. 424.

Sullivan vs. Kidd, 254 U. S. 433.

In re Stixrude's Estate, 58 Wash. 353, the Supreme Court of the State of Washington said:

"This construction of the terms of the treaty finds additional support when we call to our aid the general rule of liberal construction applied by the courts, both state and Federal, in such cases." In *Geoffrey vs. Riggs, supra,* at page 271, Justice Field said:

"It is a general principle of construction with respect to treaties that they shall be literally constructed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction words are to be taken in their ordinary meaning, as understood in the public law of

nations, and not in any artificial or special sense impressed upon them by local law, unless such retricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of the rights that may be claimed under it and the other favorable to them, the latter is to be preferred. *Haunstein vs. Lynham,* 100 U. S. 483, 487."

"See also *28 Am. & Eng. Ency. Law* (2d ed.), 490; *Devlin, Treaty Power,* Secs. 116, 125b."

In that case the Supreme Court of Washington held that the words "goods and effects" in Article VI of the Treaty of Amity and Commerce of 1783, as revived by Article XVII of Treaty of Commerce and Navigation of 1827 between Norway and Sweden and United States, permitting the subjects of the contracting parties in the respective states to freely dispose of their goods and effects either by testament, donation, or otherwise, included real as well as personal property, and cited in support of that conclusion the following cases:

Adams vs. Akerlund, 168 Ill. 632.

University vs. Miller, 3 Dev. (N. C.) 188.

1 Bouvier's Law Dictionary (Rawle's Rev.), 635.

Attention may be called to the fact that the Terraces have the right to urge and rely on the provi-

sions of the treaty as fully as their alien complainant.

Buchanan vs. Warley, 245 U. S. 60, 73.

The question then is what is meant by the phrases "commercial purposes" and "incident to or necessary for trade," as used in Article I of the treaty. In order to give effect to all portions of the Article, pursuant to a familiar rule, it is necessary to ascertain what rights have been granted by that portion of the article preceding the quoted phrases. First, express right is given to enter, travel and reside in the territories of the other to carry on trade, wholesale and retail. Giving the word "trade" its most limited meaning, namely, buying and selling commodities, it follows, of course, that the grant of that right includes the right to take and deliver possession thereof, and to pay therefor on purchase and receive and collect the purchase price of the same who sold. Even if the right to resort to the courts and to the remedies provided by law for the enforcement of contracts or the rights accruing on a breach thereof be not implied in the right to carry on trade, it is a constitutional right which the legislature could not deny to the alien. Having the right to buy and take possession, there is implied the right to retain possession during the interim

between purchase and sale. Next, there is an express grant of the right "to own or lease and occupy houses, manufactories, warehouses and shops," which for present purposes, we construe as intended merely for the purpose of carrying on trade, limited as above suggested, and that the right to own or lease so given applies only to the buildings as distinguished from the real estate on which they may be situated. It will be seen from the foregoing that every possible thing necessary for trade, limited as above suggested, is granted in express terms or by necessary implication and that no effect follows the grant of the right "to do anything incident to or necessary for trade" if the term trade be limited as above suggested. Therefore, in order to give effect to all parts of the article, the word trade must be given a broader meaning. Consequently we must consider what was intended to be granted by the right to lease land for commercial purposes, when read in connection with the right to do anything incident to or necessary for trade. Suppose an alien corporation, as defined by the act, should be engaged in an extensive wholesale hardware business, and that it bought from manufacturers all of the articles dealt in, except one small line, which it manufactures itself; suppose, further, it should lease a building with the real estate on which the same was situ-

ated for the purpose of a factory in which to manufacture that one small line of articles. Clearly the manufacture of that limited line of articles would be incident to its wholesale hardware business, and equally clearly would the leasing of the building and real estate be incident to or necessary for its wholesale hardware business, and would be for "commercial purposes." Suppose the number of articles manufactured by it for its wholesale hardware business should be increased; the manufacture and leasing would be equally as clearly necessary for or incidental to trade, and would be for "commercial purposes." No reason appears why it could not increase its manufacture to include the substantial part or all of the articles sold by it in its wholesale hardware business. The same thing would be equally true were the company engaged in wholesale trade in any other commodity or commodities, and it is submitted that, in this respect, there can be no distinction between farm products and any other commodities. In view of the fact that the two terms in question can have no effect unless the term "trade" is given the broader signification which we suggest, it seems perfectly clear that such broader meaning was intended by the parties to the treaty. Clearly the right which we contend under the treaty is not a frivolous claim, and pursuant to the rule laid

down by this Court, that construction of the article urged by us should be adopted.

We call attention to the fact that in the bill of complaint it is alleged that Nakatsuka is engaged in the business of trading, wholesale and retail, in farm products, and, instead of purchasing such farm products, he has produced and desires to produce his products for the purpose of selling them in wholesale and retail trade. If he is prevented from leasing land for the purpose of producing said farm products for such trade, he will be prevented from engaging in trade and the incidents to trade authorized to do under the Treaty. On similar principles those allegations stand admitted by the motion to dismiss. Being engaged in wholesale and retail trade in farm products, it is submitted that producing the said farm products is a commercial purpose and is incident to or necessary for trade therein.

Again, the term trade is not generally given the limited meaning first above suggested. In *Schooner Nymph,* 1 Summ. (U. S.) 517, in interpreting the word trade as used in a statute declaring that if any licensed vessel or ship "shall be employed in any other trade than that for which she is licensed," she shall be forfeited, Storey, J., said:

"The word 'trade' is often, and indeed

> generally, used in a broader sense, as equivalent to occupation, employment, or business, whether manual or mercantile. Whenever any occupation, employment or business is carried on for the purpose of profit or gain or a livelihood, not in the liberal art or in the learned professions, it is constantly called a trade."

In that case codfishing was held to be a trade.

In the case of *May vs. Rice,* 101 U. S. 231, 237, the following appears:

> "The word 'trade,' in the broadest signification, includes not only the business of exchanging commodities by barter, but the business of buying and selling for money, for commerce and traffic 'generally'."

In the case of *Colby vs. Dean,* 70 N. H. 591, the court held that, where the beneficiaries of a will, both male and female, one of whom was a school teacher at the time of making the will, were to take only on condition that they had some useful trade, the shares of those failing to go to those complying with the conditions, the term "trade" was used in the broad sense of occupation or profession, rather than of mechanical employment; and beneficiaries who were bookkeepers, typewriters, and school teachers complied with the condition.

In *Jackson vs. Town of Union,* 82 Conn. 266, it was held that "to trade" is to engage in the purchase or sale of goods, wares and merchandise, and

that a firm engaging in the business of buying standing timber in large quantities and cutting the same, and selling the lumber is engaged in a trading business within Gen. St. 1902, Sec. 2342, providing for the effectment for taxation of the property of any trading business.

In the case of *State vs. North,* 160 N. C. 1010, the court had under consideration the case of a statute authorizing taxation of trades, professions, franchises and incomes, and during the course of an opinion said trade comprehends

> "Not only all who are engaged in buying and selling merchandise, but all whose occupation or business it is to manufacture and sell the products of their plants. It includes in this sense any employment or business embarked in for gain or for profit."

In the case of *Smith vs. Cooley,* 65 Cal. 46, the court held that the working of a mine under a bare mining right has uniformly been construed by the courts as a species of trade.

In the case of *Finnegan vs. Knights of Labor Building Ass'n,* 52 Minn. 239, the court, considering a cooperative act permitting the formation of corporations, among other things, "to trade," said:

> "Giving a reasonably liberal meaning to the word 'trade' in the Act, it would include the buying, selling of real estate," * * *

These authorities show that the term "trade" is not always given a narrow meaning, but that its meaning is determined according to the apparent intention of the parties to the instrument in which it is used. As we have shown heretofore, if the limited meaning suggested is given the word, then the phrase "incident to or necessary for trade" is surplusage and creates no right whatever.

Respectfully submitted,

JAMES B. HOWE,
E. H. GUIE, and
DALLAS V. HALVERSTADT,
Solicitors for Appellants.